

INTERIOR BOARD OF LAND APPEALS

United States v. Pitkin Iron Corp., et al.

170 IBLA 352 (November 29, 2006)

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UNITED STATES v. PITKIN IRON CORPORATION, ET AL.

IBLA 2004-261

Decided November 29, 2006

Appeal from decision issued by Chief Administrative Law Judge John C. Holmes dismissing a Government contest against the Chemin Nos. 5 and 6 placer mining claims for failure to present a prima facie case. Colorado 763.

Reversed; record reviewed de novo; mining claims declared null and void.

1. Mining Claims: Common Varieties of Minerals:  
Generally--Mining Claims: Determination of Validity

Limestone of chemical or metallurgical grade, or that is suitable for making cement, is subject to location under the mining laws of the United States. 43 CFR 3830.12(d). The test for concluding whether any other deposit of limestone is an uncommon variety locatable under the Common Varieties Act requires the following analyses: (1) comparing the deposit with other deposits of such minerals generally; (2) determining whether the deposit has a unique property; (3) determining whether the unique property gives the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, determining whether the deposit has distinct and special value for such use; and (5) determining whether the distinct and special value is reflected by a higher price that the material commands on the market.

2. Administrative Procedure: Adjudication--Mining Claims:  
Common Varieties of Minerals: Generally--Mining Claims:  
Contest--Rules of Practice: Government Contests--Rules of  
Practice: Hearings

When the Government alleges that a mining claim is invalid because it was located for a common variety of

stone, the Government must present sufficient evidence to establish a prima facie case that the deposit does not possess a unique property giving it a distinct and special value. When the Government's prima facie case has been made, the claimant bears the ultimate burden of persuasion to show by a preponderance of the evidence that the deposit in question is an uncommon variety, and therefore locatable.

3. Administrative Procedure: Administrative Review--Board of Land Appeals--Mining Claims: Contests--Rules of Practice: Appeals: Generally

After a hearing considering a mining claim contest complaint, the Board may review the decision of the Administrative Law Judge to determine whether it is consistent with law and whether conclusions regarding the evidence are consistent with the facts of record. If the Board concludes that the Judge improperly dismissed the contest for the Government's failure to present a prima facie case, and the parties have submitted their entire cases at a hearing, the Board may exercise its de novo review authority to consider the evidence of record and issue a decision consistent with applicable law.

4. Materials Act--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Marketability--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property

That a mining claimant can identify a use for limestone that commands a higher price than a use that all parties concede requires only a common variety of stone is not enough, by itself, to demonstrate that the limestone is an uncommon variety. The claimant must also establish that the deposit has a unique property that gives the deposit a distinct and special value. Evidence of a higher price available in the market can supply proof that a deposit has unique value, but it must be evidence of the higher price the deposit commands, not evidence of a higher price purchasers will pay for material from a deposit of a common variety of limestone.

5. Materials Act--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property

The distinct and special value making a deposit of stone uncommon must be reflected by attributes inherent in the deposit itself and cannot be predicated on extrinsic factors. Where a mining claimant is able to provide better service, or undercut a competitor's prices because it fails to include the costs it incurred in mining stockpiled material in its price, or provides superior screening of crushed stone, such circumstances constitute value factors extrinsic to the deposit.

6. Materials Act--Mining Claims: Common Varieties of Minerals: Generally

Where limestone is used for the same purpose that a common variety of limestone would be used for, a claimant may show that its limestone is nonetheless an uncommon variety of stone by showing that the mineral deposit in question has a unique property, and that the unique property gives the deposit a distinct and special value for such use. Where the Government submits evidence that the limestone at issue is found throughout the State of Colorado and is actively mined at 51 quarries, and avers that limestone of the quality found on the mining claims at issue, even as identified by the claimant, is found in inexhaustible quantities throughout the State, the claimant fails to rebut this proof by comparing its limestone to other such materials generally at its peril.

APPEARANCES: Geoffrey P. Anderson, Esq., Englewood, Colorado, for appellees; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEMMER

On behalf of the United States of America, the Bureau of Land Management (BLM), U.S. Department of the Interior, appeals from the May 3, 2004, decision of Chief Administrative Law Judge John C. Holmes (ALJ or Judge Holmes), dismissing the Government's contest complaint against the Chemin Nos. 5 and 6 placer mining

claims. Judge Holmes concluded that the Government had not presented a prima facie case that the mining claims were located for a common variety of limestone. For the reasons stated below, we reverse Judge Holmes' conclusion that the Government did not establish a prima facie case, and proceed to exercise our authority to consider the case de novo based upon the evidence of record.

Since the 19<sup>th</sup> century, the Mining Laws of 1866 and 1872, as amended, have permitted location of valuable mineral deposits on the public lands of the United States. See generally 30 U.S.C. §§ 21-47 (2000); Leadville Corp., 166 IBLA 249 (2005). While valuable metalliferous deposits of such substances as gold and silver were clearly contemplated as "locatable" under the mining laws, debate ensued over the locatability of more common nonmetalliferous deposits. Though the Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (2000), provided that "[a]ny person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims," questions arose regarding whether common building materials could be located under the mining laws. The locatability of limestone, both as a building stone and for other uses, raised particular questions due to its prevalent nature. At various points, the Department rejected limestone as a locatable mineral because of its nationwide abundance.

As to the limestone deposits, the existence of which upon portions of the ground is testified to by claimant's witnesses, it is sufficient to say that they have not been demonstrated to be of such quality as to give them any substantial value over and above other limestone deposits of that region which are there shown to exist in immense quantities and more favorably situated with relation to transportation facilities, or otherwise to bring them within the category of mineral deposits subject to location under the mining laws.

Gray Company Trust (On Rehearing), 47 L.D. 18, 20 (1919). The Department vacillated over the extent to which limestone and other types of rock materials should be considered subject to location. E.g., Zimmerman v. Brunson, 39 L.D. 310 (1910), overruled, Layman v. Ellis, 52 L.D. 714 (1929); see 1 American Law of Mining § 8.01[3] (2d ed. 2006), at 8-4 through 8-6; United States v. Kaycee Bentonite Corp., 64 IBLA 183, 206, 89 L.D. 262, 274-75 (1982) (general discussion of common varieties case law pre-1955). Departmental precedent defined a deposit of stone, including limestone, as "locatable" if it contained "some property giving it special and distinct value." 1 American Law of Mining § 8.01[3] (2d ed. 2006), at 8-6.

Congress generally removed nonmetalliferous materials from location under the mining laws with the passage of the Multiple Surface Use Act of 1955, also known as the Common Varieties Act, 30 U.S.C. § 611 (2000). Rather than define

deposits as locatable based on type or composition, Congress adopted the line previously drawn in precedent to divide “common” from “uncommon” minerals:

No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders \* \* \* shall be deemed a valuable deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such laws. \* \* \* “Common varieties” as used in this [Act] does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value \* \* \*.

30 U.S.C. § 611 (2000). While uncommon varieties could be located under the mining laws, common varieties of mineral materials would be disposed of by sale under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000); City of Sparks, 166 IBLA 21, 25 (2005).

The only evidence of Congress’ intentions with respect to limestone appears in the legislative history of the Common Varieties Act. In the House Report, drafters explained that the statutory definition of “common varieties” “would exclude materials such as limestone, gypsum, etc., commercially valuable because of ‘distinct and special’ properties.” H.R. Rep. No. 730, 84th Cong., 1st Sess. 9 (1955). The Senate Report provided incrementally more explanation in stating that the definition of “common varieties” was intended to exclude “for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like.” S. Rep. No. 554, 84th Cong. 1st Sess. 8 (1955).

[1] This language formed the basis for a Departmental regulation implementing the Act, 43 CFR 3511.1(b) (1965), promulgated in 1964. 29 FR 4584 (Mar. 31, 1964). It was recodified at 43 CFR 3711.1(b) (2002) in 1970. 35 FR 9731 (June 13, 1970). The original and recodified rules stated, in pertinent part:

(b) “Common varieties” includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be “common varieties” if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industrial

practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not “common varieties.”

43 CFR 3711.1(b) (2002). Thus, for deposits generally, use in “trade, manufacture,” or “science” did not ipso facto mean that a material was “uncommon.” An uncommon variety of limestone, in particular, was “suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like.”

In Coleman v. United States, 390 U.S. 599 (1968), the Supreme Court held that building stone is covered by the Common Varieties Act and is subject to location only if it is not a “common variety.” United States v. Melluzzo, 76 I.D. 181 (1969); United States v. Pfizer & Co., Inc., 76 I.D. 331, 336, 337 (1969) (Pfizer). The Court did not directly address questions, later adjudicated by the Department, regarding how the Common Varieties Act dealt with stone that was not building stone.

The Department considered circumstances under which limestone could be an uncommon variety. E.g., United States v. Multiple Use, Inc., 120 IBLA 63, 77 (1991). In United States v. Pierce, 75 I.D. 255, 260 (1968), the Department held:

Even though we assume that the deposit of limestone may be classified as an uncommon variety, the mining claim based upon it must satisfy the requirements of the mining law. One of these as we have seen, is that there must be a present profitable market for the deposit. It must be a market based either upon the use making the limestone an uncommon variety \* \* \* or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command \* \* \*.

(Emphasis added.)

In a case decided in 1969, the Department analyzed the Congressional statements regarding limestone, and the meaning of the phrase “[l]imestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like” found in 43 CFR 3711.1(b). Pfizer, 76 I.D. at 337-39. The Assistant Solicitor began with the identification of the problem created by considering limestone as potentially locatable, given its ubiquitous nature.

Limestone is, without question, a mineral of very widespread

occurrence. Approximately 15 percent of the United States \* \* \* is underlain by limestone or carbonate rock, and about 70 percent of all crushed stone used in the United States is made from such materials. \* \* \* The Department has held that limestone is included within the meaning of the term “stone” as it is used in the 1955 act, and that a deposit of limestone is a common variety of stone within the meaning of the act if the material found therein does not satisfy the criteria of the statute and the regulations for exclusion from the category of “common varieties.” See e.g., Solicitor’s opinion M-36619 (Supp.) (October 5, 1961) \* \* \*.

76 I.D. at 338 (footnote and citations omitted). Turning to the rule, the Assistant Solicitor noted that “production of cement” and “metallurgical or chemical grade limestone” are two separate components of the rule. He stated:

Witnesses for the contestant stated that the material found on the Largo Vista claims is not suitable for use in the manufacture of cement because of its high magnesium content \* \* \* .

With respect to the question of whether the material found on the claims is metallurgical or chemical grade limestone, the testimony \* \* \* was conflicting \* \* \*.

76 I.D. at 339. The Assistant Solicitor explained that the term “metallurgical or chemical grade limestone” was not well defined and that Congress provided little instruction on its meaning. Thus, he analyzed the terms as found in precedent as well as in the Internal Revenue Code and concluded:

[T]he courts have held that a limestone averaging 95 percent or more total carbonates constituted a chemical or metallurgical grade limestone within the meaning of the tax laws. Since the rulings were based on the findings that such was the commonly understood commercial meaning of the terms “chemical grade” and “metallurgical grade” limestone, we are persuaded that the same meaning should be given to the Senate committee’s understanding of what would constitute an uncommon variety of limestone. We hold, therefore, that limestone containing 95 percent or more calcium and magnesium carbonates is an uncommon variety of limestone which remains subject to location under the mining laws.

Id. at 342-43 (emphasis added). Pfizer’s construction of the term “metallurgical or chemical grade limestone” has been followed since 1969. United States v. Foresyth, 100 IBLA 185, 247-48, 94 I.D. 453, 487-88 (1987); United States v. Multiple Use,

Inc., 120 IBLA at 86 n.22. Thus, limestone containing 95% or more total carbonates is per se locatable.

In 1969, the United States Court of Appeals for the Ninth Circuit adopted a five-part test for determining generally whether a mineral deposit is a common variety of material. These guidelines are as follows:

(1) [T]here must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market place.

McClarty v. Secretary of the Interior, 408 F.2d 907, 909 (9th Cir. 1969). The Board has followed this test for over 30 years. E.g., United States v. Thompson, 168 IBLA 64, 75 (2006); United States v. Guzman, 18 IBLA 109, 120; 81 I.D. 685, 690 (1974).

Since McClarty, IBLA precedent has been somewhat ambiguous over whether only “metallurgical or chemical grade limestone” can be located. Some cases have suggested that this is the case. United States v. Foley, 142 IBLA 176, 184 (1998), dismissed, No. N-00-0435-HDM-VPC (D. Nev. Sept. 25, 2003); dismissed, No. 00-553-C (Cl.Ct., Apr. 20, 2001); United States v. Foresyth, 100 IBLA at 215-16; United States v. Husman, 81 IBLA 271, 274 (1984), aff’d, 616 F.Supp. 344 (D. Wyo. 1985). Others have entertained the possibility that limestone can be found to be locatable for uses other than “metallurgical or chemical grade limestone,” if it meets the test of McClarty. E.g., United States v. Smith, 115 IBLA 398 (1990) (travertine, a type of limestone), aff’d, No. A91-066 (D. Alaska Feb. 28, 1991), rev’d United States v. Smith, 86 F.3d 1165 (9th Cir. 1996), Smith v. United States, 18 Fed. Appx. 582, 2001 WL 1019884 (9th Cir. 2001) (holding travertine to be common variety).<sup>1/</sup>

In 2003, the Department amended a number of its regulations, including 43 CFR 3711.1 (2000), in order to repromulgate them, including a rule regarding common varieties, in question and answer format. 68 FR 61064 (Oct. 24, 2003), effective Nov. 24, 2003. In this rulemaking, the Department retained the specific

<sup>1/</sup> In Knipe v. United States, 170 IBLA 161, 167 (2006), we cited United States v. Smith, 115 IBLA 398, without noting that it had been reversed. While we cite it here as evidence of cases where the Board has envisioned a class of limestone broader than chemical grade or that used in metallurgy as potentially “uncommon variety,” the case’s history must be taken into account in assessing its precedential value.

definition of “locatable” limestone, derived from the 1955 legislative history and as analyzed in Pfizer, but deleting the phrase “and the like.” It also codified the test set forth in the McClarty decision. 43 CFR 3830.12(b). The rule answers the question “What are the characteristics of a locatable mineral?” as follows:

(b) Under the Surface Resources Act, certain varieties of mineral materials are locatable if they are uncommon because they possess a distinct and special value. <sup>[2/]</sup> As provided in *McClarty v. Secretary of the Interior*, 408 F.2d 907 (9th Cir. 1969), we determine whether mineral materials have a distinct and special value by:

- (1) Comparing the mineral deposit in question with other deposits of such minerals generally;
- (2) Determining whether the mineral deposit in question has a unique physical property;
- (3) Determining whether the unique property gives the deposit a distinct and special value;
- (4) Determining whether, if the special value is for uses to which ordinary varieties of the mineral are put, the deposit has some distinct and special value for such use; and
- (5) Determining whether the distinct and special value is reflected by the higher price that the material commands in the market place.

\* \* \* \* \*

(d) Limestone of chemical or metallurgical grade, or that is suitable for making cement, is subject to location under the mining laws.

\* \* \* \* \*

43 CFR 3830.12 (emphasis added).

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<sup>2/</sup> Subsection (a) contains provisions referencing requirements of the mining laws not relevant to the dispute here. Likewise, subsections (c) and (e) define, respectively, block pumice and gypsum. We need not address those definitions for this appeal. The proposed rule, 64 FR 47023 (Aug. 27, 1999), did not contain a separate section for limestone. The final rule gave no explanation of its addition of subsection (d) or its removal of the words “and the like” from the earlier rule.

The background of this appeal was presented in Mid-Continent Resources, Inc., Pitkin Iron Corporation (Mid-Continent), 148 IBLA 370 (1999). We attempt to recite only that much of the background facts necessary to resolve this dispute.

During the 1980s and up until 1992, Mid-Continent Resources, Inc. (MCR), or Pitkin, mined chemical grade limestone with a calcium carbonate content in excess of 95% from the “Leadville” limestone deposit at the Mid-Continent Quarry, which was located on mining claims on public lands administered by BLM in Garfield County, Colorado.<sup>3/</sup> MCR processed the locatable grade limestone and sold it as a fire suppressant at its own underground coal mining operation, and as a smokestack scrubber agent at a nearby coal-fired power plant. What it did not sell, MCR and/or Pitkin put into three stockpiles on nearby lands in sec. 36, T. 5 S., R. 89 W., 6<sup>th</sup> Prime Meridian. The mining claims lapsed, MCR closed the quarry, and effective October 21, 1993, BLM declared the subject lands a community pit that “constitutes a superior right to remove material as against any subsequent claim or entry of the land.” MCR and Pitkin challenged the community pit designation, and this Board issued its decision in Mid-Continent, affirming the BLM decision.

The question not resolved in that case was whether MCR or Pitkin could sell stockpiled materials as locatable materials under the mining laws or, conversely, as common variety mineral materials under contract from BLM. The Board stated that it was unclear from the record whether the stockpiled material was uncommon variety limestone, as MCR had asserted, both because there was no showing of a unique property conferring distinct and special value and because the quality of the material from the stockpiles was impermissibly based on non-representative “grab samples.”<sup>4/</sup>

Our holding that limestone having a total carbonate content of 95 percent or better is locatable does not preclude location of a limestone deposit containing less than 95 percent total carbonate content, so long as the limestone has a property giving it a unique value which is reflected in a higher price than a common variety limestone would command. McClarty v. Secretary of Interior, 408 F.2d 907, 909 (9th Cir. 1969); United States v. Multiple Use, Inc., 120 IBLA 63, 83 (1991); United States v. Foresyth, [100 IBLA 185,] 245, 94 I.D. [453,] 486 [(1987)]; United States v. Pierce, 75 I.D. 255, 260 (1968); United States v. Lease, [6 IBLA 11,] 17, 79 I.D. [379,] 381-82 [(1972).]

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<sup>3/</sup> Pitkin contests BLM’s assertion that MCR mined the quarry and claims that Pitkin was the quarry operator. (Pitkin Answer at 5, citing Transcript of Hearing at (Tr.) 278.) MCR leased the lands from a mining claimant of record in the early 1990s, and Pitkin was the quarry operator. (Pitkin Exhibit (P. Ex.) 15.)

<sup>4/</sup> The analysis of the 1994 “grab samples” from the Grand Junction Laboratories appears in the record at P. Ex. 19.

Moreover, although neither the assay sampling nor the methodology and results have been directly called into question by Appellants, we note that grab sampling is not an acceptable sampling method for quantitative purposes, 6/ and thus we question the significance attributed to the assay results, particularly where, as here, BLM took only two samples from the fines stockpile, and a total of only four samples from the three stockpiles, despite the volume of material involved. We therefore set aside the Decision insofar as it declares the third stockpile to be subject to disposition only pursuant to the Common Varieties Act. BLM has stated that Appellants are authorized to quarry and remove locatable grade limestone and to market it for qualifying uses, and that this authorization encompasses the locatable grade mineral in two stockpiles. See BLM letter of February 25, 1994. On the record before us, we conclude that the authorization must extend to the third stockpile as well. As to that third stockpile, although it is argued that the fines have “immediate sale value without further processing” (SOR at 2), we observe that Appellants do not aver that the fines can be sold for a qualifying end use, and as noted, the record suggests the opposite conclusion. We hold that Appellants may dispose of mineral material from any or all of the stockpiles, provided they can show to BLM’s satisfaction that they can market it for qualifying end-uses.

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6/ The BLM Manual, Handbook for Mineral Examiners, H-3890-1, at Ch. IV-3C provides:

“C. Grab Samples.

Although grab sampling may yield valuable information, it is not systematic or statistically valid. The mineral examiner should use grab sampling cautiously because unintentional high grading is always possible. Layering or segregation of mineral values may be present. Grab sampling is not recommended; it carries little probative value on the witness stand. Grade and tonnage figures are not reliable if calculated from grab samples.”

See also F. Pitard, Pierre Gy’s Sampling Theory and Sampling Practice 2d (1993), at 206.

148 IBLA at 377-78. Accordingly, “we le[ft] for another day” the question of whether the stockpiles could constitute a “deposit” subject to the mining laws. Id. at 378.

The Board clearly anticipated further sampling of the stockpiles. Consistent with 43 CFR 3711.1(b) and Pfizer, material with a total carbonate content in excess of 95% would be defined as locatable, while material with a lesser carbonate content must display “a property giving it a unique value which is reflected in a higher price

than a common variety limestone would command,” and must meet the tests of McClarty, 408 F.2d at 909. MCR or Pitkin was required to show that the material from the stockpiles had a “qualifying end use,” defined as a qualifying “market.” 148 IBLA at 379.

On May 10, 2001, Pitkin located 11 mining claims under the names “Cascade” and “Chemin” including claims covering the now closed quarry. With respect to the lands on which the stockpiles are located, Pitkin relocated the Chemin Nos. 5 and 6 mining claims, in the W1/2 SE1/4 SE1/4 (No. 5) and E1/2 SW1/4 SE1/4 (No. 6) of Section 36, T. 5 S., R. 89 W., 6<sup>th</sup> Prime Meridian, 2 miles north of Glenwood Springs, Colorado. These claims were serialized CMC-251545 (No. 5) and CMC-251546 (No. 6). BLM conducted a mineral examination of the various claims. It performed detailed sampling analysis of the stockpiles in 2001 and prepared a 2002 Mineral Claims Validity Examination Report (Mineral Report). Certified Mineral Examiner Jim Wilkinson concluded that the limestone remaining in the stockpiles was common limestone material on the ground that it was sold as a basic soil additive to the Climax Mine reclamation facility to neutralize acidic soils left behind after molybdenum mining.

On February 21, 2003, BLM initiated the contest complaint challenging the validity of the Chemin Nos. 5 and 6 mining claims. BLM named locators Pitkin, Diane Delaney, and Robert Delaney as contestees. The contestees answered the complaint with a denial of the contest contentions on March 24, 2003, and we refer to the contestees collectively as “Pitkin” in this decision.

Judge Holmes conducted a hearing on October 28 and 29, 2003, in Golden, Colorado. BLM presented the testimony of Wilkinson and Mineral Review Examiner Roy Drew. Pitkin presented the testimony of Diane Delaney, attorney for and vice president of Pitkin; Greg Lewicki, mining consultant to MCR for reclamation of the Coal Basin Mines near Redstone, Colorado; and Bryce Romig, environmental manager for the Climax Molybdenum Company Mine (Climax Mine) owned by Phelps Dodge Mining Company (Phelps Dodge). Judge Holmes allowed the Government to present its case, Pitkin to present its defense, and both parties to present exhibits including mineral reports and mining studies. Both parties submitted post-hearing briefs and replies, and Pitkin submitted a surreply.

On May 3, 2004, Judge Holmes issued his decision dismissing the contest. He concluded that the Government had not presented a prima facie case based on the Government’s failure to apply the correct legal test to the limestone at issue, and its “failure to supply the salient factual data regarding same.” (Decision at 7.) He held that “the opinions offered by the mineral examiners in this matter have not been adequately supported by facts or law.” *Id.* at 15. Citing the standard for a prima facie case set forth in United States v. LeFaivre (LeFaivre), 138 IBLA 60, 67 (1997),

Judge Holmes correctly explained that to evaluate the Government's case he could only look to the evidence submitted by the Government. But he proceeded, instead, to factor information submitted in Pitkin's rebuttal case into his determination regarding whether the Government had met its burden. Quite simply, Judge Holmes did not follow the standard he set for himself to consider the Government's case-in-chief in deciding whether it was a prima facie presentation of evidence. The decision must be reversed for that reason.<sup>5/</sup>

Moreover, it is not possible to modify his analysis in order to save the outcome. Judge Holmes not only looked to the testimony of Romig, Pitkin's sampling evidence, and Pitkin's legal position at the hearing to decide whether the Government had satisfied its burden, but his analysis of the parties' positions was based on assertions submitted by Pitkin in its briefs that the Judge relied on to characterize the Government's position, even though the Government disavowed such contentions in its own briefing. Judge Holmes adopted as well the statements of Pitkin's counsel as the correct legal framework, without independently addressing whether they were correct. The Judge inappropriately accepted the arguments of Pitkin's counsel as a statement of the Government's position, and then struck down that position based upon Pitkin's construction of the law.<sup>6/</sup> BLM cites to the following part of Judge Holmes' decision as reflecting his misunderstanding both of the test that should have been applied to determine whether BLM had presented a prima facie case and also of the law on common varieties:

First, [Wilkinson and Drew] evidently believe that a total carbonate content of 95 percent is a prerequisite to the location of limestone as an uncommon variety. Second, [they] compared Pitkin's limestone to

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<sup>5/</sup> It appears that Judge Holmes also confused the legal standard that governs whether the Government has met its burden of showing, by a prima facie case, that a discovery of a mineral deposit has not been made with the standard governing whether the Government has met its burden of showing that the deposit is a common variety: "Here, the Government's specified mineral examiners' [] opinions are not based on the proper standard for determining whether a discovery has been shown. Therefore, as outlined in [United States v. Hooker, 48 IBLA 22, 28 (1980)], a prima facie case has not been established." (Decision at 5.) The contest was based on the Government's assertion that Pitkin's limestone was a common variety; thus, the test outlined in Hooker was not the controlling one here.

<sup>6/</sup> Judge Holmes' adoption of Pitkin's legal position as a foundation for determining the existence of the Government's prima facie case may derive from a belief that he was obligated to accept as true the facts of the opponent of the contest complaint. Such concepts do not apply to the analysis of a prima facie case; Pitkin's position should have had no part in that stage except to the extent the Government relied on or adopted Pitkin's information as its own.

locatable grade “similar limestone” rather than ordinary limestone in the [Mineral Report]. Third, [they] do not consider use of a limestone as a chemical soil amendment to be an uncommon variety use.

(Decision at 7.) BLM is correct that these assertions are contentions found in Pitkin’s post-hearing briefs. We thus begin again.

[2] The determination of whether the Government met its burden of presenting a prima facie case is only a threshold to cross; it is not an analysis of the parties’ cases against each other. We set forth the standard in LeFaivre:

When the Government contests a mining claim alleging that the claim is invalid because it was located for a common variety mineral, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. See United States v. Multiple Use, Inc., 120 IBLA [at 82]; see also United States v. Mineco, 127 IBLA 181, 187 (1993). Once the Government has presented a prima facie case, the burden shifts to the contestee to overcome this showing by a preponderance of the evidence.

138 IBLA at 67. The claimant remains the ultimate proponent of the claim’s validity:

The Department has, through its decisional law, assigned the Government the burden of going forward to establish a prima facie case (the burden of production), while at the same time recognizing that, consistent with Court decisions such as Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), it is the mining claimant who is the actual proponent of the rule that the claim is valid, and, therefore, it is the mining claimant who bears the ultimate burden of persuasion (burden of proof). See, e.g., United States v. Knoblock, 131 IBLA 48, 81, 101 I.D. 123, 140-41 (1994), and cases cited.

138 IBLA at 67 n.6; see also Knipe v. United States, 170 IBLA at 166.

That the threshold burden on the Government to go forward is a limited one is explained in United States v. Dresselhaus, 81 IBLA 252, 257 (1984). There, we held that even if the Government shows only that one essential criterion of the discovery test was not met, it has established a prima facie case as to that criterion. Though Dresselhaus was not a common varieties case, the rule that it is enough for the Government to show that a single essential criterion is not met is nevertheless consistent with the test set forth in LeFaivre. In the common varieties context, the Government need only show that the mineral deposit does not possess a unique

property giving it a distinct and special value to meet its burden. To the extent Judge Holmes believed, as suggested in the language quoted from his decision, that in order to make a prima facie case the Government was obligated to refute every element of proof that might be presented in a claimant's rebuttal case, he was in error. Cf., United States v. Segna, 49 IBLA 73, 75 (1980).

We turn to the Government's proof to determine whether it met the burden articulated in LeFaivre. BLM submitted the 2002 Mineral Report through Wilkinson's and Drew's testimony. That report, which is the Government's Exhibit (Govt. Ex.) 1, documented the history of the mining claims, the MCR quarry, the mining on the quarry, and the debate over the community pit. The report explained the geology and mineralization of the Leadville limestone outcrop found on what is now the Chemin Nos. 1-4 mining claims. It described the 1994 grab sampling from the stockpiles rejected by the Board in Mid-Continent, 148 IBLA at 377-78, and the 2001 sampling program BLM conducted. The report explained that the Chemin Nos. 5 and 6 claims had two "accessible large fines stockpiles of lower grade mining crushed fines type limestone and dirt material," which BLM sampling indicated contained calcium carbonate materials of 74-92%. (Mineral Report at 12.) Acknowledging that the chemical grade quality of the Leadville outcrop at the site of the MCR quarry, as well as the nearby Marblehead Quarry, was locatable, the report contrasted the in situ material in the quarry with that found in the stockpiles. The material in the stockpiles was described in the report as "35,000 tons of lower graded, waste type material" left behind after the sale of the higher grade limestone from the quarry. Id. The report also identified a smaller (400 ton) pile of higher grade "(+95%)" material on an upper bench of the Chemin No. 5 claim which was "not considered to be of sufficient quantity to be of significant commercial interest." Id.

The Mineral Report explained BLM's mineral examinations of the stockpiles:

[T]he area was examined and sampled on 05/16/01 by Jim Wilkinson and Bruce Fowler, accompanied by the mining claimants. Twenty four (24) approximately 2,000 gram samples were taken, primarily from the main crushed fines material on the Chemin Nos 5 and 6 claims. On the crushed fines piles, the exposed (weathered) surface material (3-6") was removed prior to taking the samples with a shovel. This was in agreement with the mining claimant and the consultant. The sample sizes averaged approximately 5" x 5" x 5". All were bagged, marked, photographed, stored securely then assayed by Grand Junction Labs of Grand Junction, Co (see results attached, #11). From a[n] overall representative standpoint, it was decided to take the samples approximately 40' apart across the crushed fines piles (see attached field map and photos for specific locations, #6a/6b, #8). It was felt

that this interval would provide an adequate general representation of the overall quality of the stockpiled material.

For comparison, some representative samples were also taken in the exposed highwall north of the claims being evaluated. These were chip samples which measured approximately 5" x 5" x 3" (deep). The specific assay results, weights and methods for all are attached, #11. Generally, they show a calcium and magnesium carbonate content which ranges from 74 % to 97.8 % and 0.45 % to 8.93 %, respectively. The calcium carbonate content of the in place material and the C2X and C5X stockpiles ranged from 89.1 % to 97.8 %. However, the main and lower crushed fines piles on the Chemin No 5 and No 6 claims only ranged from 74 % to 92.4 %. Overall, the main stockpile only averaged around 82 %, well below the 95 % standard. The results and specific locations are depicted on the attached field map and assay results, attachments #6 and #11 respectively.

(Mineral Report at 14-15.)

Attachment 11 to the report contains the results of the assays conducted by Grand Junction Laboratories (Lab), and Attachment 5 depicts results by sample number. For samples taken from the Chemin Nos. 5 and 6 claims, total carbonate (calcium carbonate and magnesium carbonate) ranged from 76.74 % to 97.63%, with only one total carbonate assay result above 93.79%. (Attachment 5.) The calcium carbonate content of those samples ranged from 74% to 92.4%. Id.

The Mineral Report presented an analysis of potential end-use markets. It explained that the only market found for the stockpiled material had been at the Climax Mine in Leadville, Colorado, for use as an acid reducing agent for mine discharge water for a reclamation project. (Mineral Report at 15.) For rock dust applications and stack gas reduction, the report explained that purchasers demanded "chemical grade" limestone in the range of 96-98% total carbonate, which could not be supplied by the lower quality fines in the stockpiles. The report concluded that for cement quality material, the market paid \$5-7 FOB at the stockpile site.<sup>7/</sup> For common varieties, the Report explained that there was an "inexhaustible" supply of limestones and shales with a total calcium carbonate content less than 95%.

The report presented an economic evaluation of the potential sale of stockpiled materials to the Climax Mine reclamation project. It explained that the

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<sup>7/</sup> F.O.B. means "free on board" and is the "price of consignment to customer when delivered with all prior charges paid." A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968).

project needed calcium carbonate for acid neutralization and that magnesium carbonate was irrelevant to the Mine's reclamation needs. The report presented a chart at Attachment 10 showing the price Climax was willing to pay for limestone with increasing amounts of calcium carbonate. According to the chart, the price dropped from \$25/ton to \$23.50/ton as the percentage of that carbonate decreased from 91% to 85%. According to the chart, there was no price the company was willing to pay for grades below 85% calcium carbonate. See also Government's Exhibit 4 (e-mail from Bryce Romig to BLM stating "CaCO<sub>3</sub> needs to be high to reduce handling costs for both transport and spreading"). The price to load and transport the material (fines) was \$11.75/ton leaving a profit of, for example, \$13.25/ton for 91% calcium carbonate fines material (\$25 - \$11.75 = \$13.25). (Mineral Report at 17.) The Report explained, however, that the fact that the stockpiled material had already been crushed and was ready for sale was a convenience that was extrinsic to the quality of the limestone material in the stockpiles, and not an intrinsic quality of the material making it unique. Id. at 21.

BLM submitted an exhibit showing the existence of extensive limestone formations deposited contemporaneously with the Leadville outcrop during the Mississippian era of the Paleozoic Age virtually throughout the State of Colorado. (Govt. Ex. 2; see also Tr. 78 (testimony of Wilkinson that limestone appears throughout Colorado).) It submitted as well an October 17, 2003, print-out of 51 permits granted by the Colorado Division of Minerals and Geology (DMG) for limestone mining. (Govt. Ex. 3; Tr. 81 (51 active quarries in State of Colorado).)

The Government also submitted as a part of its case-in-chief the "investigation report" prepared by Greg Lewicki and Associates for Pitkin analyzing "the use of limestone for various applications from the Glenwood Springs quarries" and others in central Colorado. (Govt. Ex. 5, Apr. 3, 2001, "Lewicki Report.") This report analyzed use of limestone from the "Marblehead" and "Mid-Continent" Quarries, as well as the nearby stockpiles with "calcium carbonate content of 90% to 92%." Id. at 1. The Lewicki Report did not consistently distinguish the materials mined and transported from the quarries from material previously mined and stockpiled. It considered use of the quarry materials for acid neutralization of soils and explained:

One of the most practical ways in countering this neutralization process in soil or mine waste is to mix fine limestone with the acidic material and cover it with a solid medium which allows plant growth. The alkaline limestone neutralizes any sulfides which break down and by keeping the pH higher, lessens the likelihood that heavy metals will leach out from the soil.

Id. at 2. The Lewicki Report explained that the Climax Mine used the material from the Pitkin (MCR) stockpiles for this purpose:

The price of the material sold to Climax in the year 2000 is based on the calcium carbonate content, according to the chart provided in Appendix C. Since trucking costs were \$11.75 per ton, the FOB mine price for limestone of 91.5% calcium carbonate was \$25.02 per ton minus \$11.75 = \$13.27 per ton.

Id. at 3. The Lewicki Report attached the chart, separately identified as Attachment 10 to the Government's Mineral Report (Govt. Ex. 1), which indicates that the Climax Mine would not purchase limestone with a calcium carbonate content of less than 85%. Notably, this chart shows that as the calcium carbonate percentage rises above 91%, for which Climax Mine would pay \$25/ton, the price rises only slightly with increased calcium carbonate. The highest price the Mine will pay for the reclamation project is \$25.50/ton for 100% calcium carbonate limestone. Less the transportation charges of \$11.75, this price would be \$13.75/ton.

The Lewicki Report examined use of quarry material as rock dust, commenting that the "Quarries" could beat 97% total carbonate content. Id. at 4. It discussed use of quarry materials for stack gas reduction at power plants and noted that "calcium carbonate content of not less than 95% is required." Given that the stockpiles were listed by Lewicki as containing 90-92% calcium carbonate, the stockpiles could not be considered for those uses. Id. at 5-6. The Lewicki Report indicated that a nearby Calco plant "revealed that they were getting \$30 per ton of bulk rock dust at the plant (not including trucking to a mine) and \$41.50 for the same rock dust packaged into bags" for material with a combined calcium and magnesium content of 98%, and 2% silica. Id. at 4. "Silica content is extremely important for rock dust use because it lowers the overall dust concentrations in a mine." Id. at 5; see also Tr. 402-403. With respect to stack gas use, the Report indicated that the nearby Maybell mine created a market for 30,000 tons of 96-97% calcium carbonate limestone and was paying an FOB mine price of \$13/ton.

The Lewicki Report considered use of the quarry materials in cement production and as road base or construction material. According to the report, it considered companies that

mix portland cement with aggregate material and water to make cement for use in roads, foundation, etc. No high grade material is needed, since the bulk of the final product is sand and gravel anyway. Silica and calcium carbonate content are not critical. For this reason the price that is paid FOB mine for this material is low: \$5 to \$7 per ton. Since other uses have already brought far better prices, the use in cement was not investigated in detail.

Id. at 6 (emphasis added). Road material limestone “is considered a common varieties use and normally commands a price of \$3 to \$6 per ton.” Id.

At the hearing, BLM witnesses testified as to the contents of these exhibits. Wilkinson testified that the Government was only contesting the Chemin Nos. 5 and 6 mining claims because the MCR Quarry was not found within their borders, the Leadville outcrop did not occur on them, and no mining was taking place on the claims other than to recover stockpiled material remaining from prior mining and sales by MCR from the quarry. (Tr. 61-64.) He explained that the main stockpile on the Chemin Nos. 5 and 6 claims contained 28,000 tons of material, while the lower stockpile contained approximately 7,000 tons. (Tr. 67.) Wilkinson testified that, after interviewing the buyer at the Climax Mine project, he concluded that the stockpiled materials had “no special or unique component.” (Tr. 77, 88.)

He testified that the small 400-ton stockpile (C5X) on the Chemin No. 5 claim had a chemical grade calcium carbonate content of 96.7%, but that there was no market for such a small quantity of material. (Tr. 97-98.) Wilkinson explained that the only use considered for the stockpiled materials was as “acid neutralization” and that this was not a qualifying end use. Wilkinson testified that the price received from the Climax Mine did not include costs to “extract, crush, screen, and deposit the materials on the Chemin 5 and 6 claims.” (Tr. 99.) He testified that comparison of prices received by Pitkin for stockpiled materials with prices received by other suppliers showed that “Pitkin is not being paid a premium.” (Tr. 115 (Calco receives \$14 FOB, while Pitkin receives \$13.27, without accounting for costs), 117, and 196 (no capital and operating costs).)

Drew testified that he did not believe that the stockpiles contained locatable minerals. He asserted that there was nothing “unique” about the grade of materials in them, because Leadville limestone is widespread throughout Colorado, and a large percentage of commonly available limestone nearby would achieve even the grade of 91% claimed by Pitkin. He testified that there is “no scarcity of other limestones that will achieve the same results” as the stockpiled fines and that a nearby Sherman mine had used approximately 300,000 tons of “wasterock, which is predominantly Leadville Limestone” with a calcium carbonate range with an average of 92%. (Tr. 230-34.) He further testified that the Environmental Protection Agency (EPA) had used 40-50,000 tons of limestone for acid neutralization at the Black Cloud mine, that the Colorado DMG had used some for acid neutralization at an abandoned mine site on BLM land, and that some was used to neutralize acidic bars along the Arkansas River “to try to raise the pH level of those bars.” (Tr. 235.)

In its post-hearing briefing, BLM explained that because the material in the piles did not constitute the 95% total carbonate that would automatically define it as “chemical grade,” under United States v. Foresyth, 100 IBLA at 247-48, “the question

faced by the ALJ here is whether or not the materials are a common or uncommon variety of limestone.” (Govt. Post-Hearing Brief at 14.) BLM concluded, *id.*, that the materials were common variety because they did not meet the test of McClarty, and proceeded to address the elements of that test in explaining why the stockpiles did not meet it. *Id.* at 15-22. Under the first part of that test, BLM stated that a comparison of the primary fines pile “with other such materials generally” revealed 51 nearby permitted quarries all mining limestone. BLM explained that the stockpiled materials had an average calcium carbonate content of 88.2%, a level which was “relatively inexhaustible in the region.” (Govt. Post-Hearing Brief at 15, citing Mineral Report at 16.) For the same reasons, BLM contended, the limestone in the stockpiles is not unique, as required by the second part of the McClarty test. *Id.* at 16-17. Even assuming the stockpiled limestone is unique, BLM contended that it does not have a “distinct and special commercial value” as required by the third and fourth parts of the test. BLM explained that the only use for the stockpiled materials that Pitkin had found was as an acid neutralizing agent at the Climax Mine reclamation project, but that calcium carbonate was the critical component of the limestone for that project. BLM contended that there were numerous sources of “limestone having a calcium carbonate content of 88.2% or better” that could achieve the same results as the limestone at the Pitkin stockpiles, and thus they had no distinct or special value. *Id.* at 19-20. Finally, BLM contended that the price Climax paid for limestone as a neutralizing agent was no higher than prices paid for similar purposes by other users, and also explained that the profit cited by the Lewicki Report failed to take into account the cost of mining the limestone. *Id.* at 22.

It is clear that the Government’s presentation met its prima facie burden under LeFaivre. BLM’s case-in-chief followed the terms of the Common Varieties Act, regulations and case law cited above in attempting to ascertain whether the stockpiles constituted an uncommon variety of limestone. BLM presented “sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value.”

Judge Holmes’ explanation of his contrary view, dependent as it was on Pitkin’s arguments, failed to acknowledge the Government’s actual contentions. The ALJ’s first objection was that BLM witnesses “evidently believe that a total carbonate content of 95 percent is a prerequisite to the location of limestone as an uncommon variety.” The above summary of the Government’s case, briefs, and evidence reveals this to be an inaccurate characterization. His second objection, that BLM “compared Pitkin’s limestone to locatable grade “similar limestone” rather than “ordinary limestone,” is a recitation of Pitkin’s argument, rather than an analysis or acknowledgment of the comparison found in the Mineral Report or the Government’s Exs. 2 and 3. More importantly, by citing Pitkin’s objection as if it were the law, the ALJ failed to comprehend that the correct test derives directly from McClarty and requires comparing “the mineral deposit in question with other deposits of minerals

generally.” This is the test adopted by this Board and the Department in the rule at 43 CFR 3830.12(b). Judge Holmes’ criticism of the Government’s comparison can be understood only by reading Pitkin’s briefs and realizing that he based it on Pitkin’s views. Finally, Judge Holmes’ third reason for concluding that the Government did not present a prima facie case, that BLM witnesses “did not consider use of a limestone as a chemical soil amendment to be an uncommon variety use,” adopts Pitkin’s assertion that use of limestone as a neutralizing agent for acidic soils (soil amendment) constitutes an uncommon variety use, the very legal issue Judge Holmes was to decide after balancing the parties’ evidence. As shown below, that issue is a matter of first impression.

[3] Once the Government met its burden, the burden shifted to the contestees to overcome that case by a preponderance of the evidence. Knipe v. United States, 170 IBLA at 166. Pitkin bears the ultimate burden of persuasion. LeFaivre, 138 IBLA at 67 n.6. The dilemma is whether to remand to the Hearings Division for an initial determination of whether Pitkin discharged its burden, given that it is not one that Judge Holmes undertook, or whether to decide the case on the record as a whole. In United States v. Lehmann, 161 IBLA 40, 88 (2004), we exercised the Board’s authority to review the record in a case involving an appeal of an ALJ’s decision considering a mining contest, where the record contained a full presentation of the parties’ positions. IBLA

has the authority to make decisions concerning appeals relating to the use and disposition of the public lands and their resources as fully and finally as might the Secretary himself. 43 [CFR] 4.1. We have previously held that: “This authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon.”

Id., citing United States v. Willsie, 152 IBLA 241, 264-65 (2000) (citations omitted).

This is the most expeditious course here. The parties’ presentations before the ALJ were complete. All that a remand would do now is compel a new ALJ to review, subject to our ultimate review authority, the record and documents we have just read to perform the same task we are prepared to undertake, consuming more of the parties’ time and resources. Accordingly, we proceed to consider whether Pitkin preponderated in its rebuttal of the Government’s case.

Pitkin submitted 50 exhibits, including a copy of the Lewicki Report and the Mineral Report also submitted by BLM. (P. Exs. 33 and 37.) A considerable number of Pitkin’s exhibits present background information regarding the Mid-Continent or nearby Marblehead Quarries, as well as the mining claims and the dispute over the

community pit. See, e.g., P. Exs. 1-3, 5, 7-17, 34; see also Tr. 310-14 (Delaney testimony regarding community pit adjudication and background of mining claims).

Delaney began Pitkin's case by testifying that MCR was a coal mining operation with a "very gassy, deep mine in need of a neutralizing agency in underground coal mines." (Tr. 280-81.) She explained that MCR needed rock dust for that purpose and thus mined and pulverized locatable limestone from the Marblehead and then the Mid-Continent Quarries. Id. at 281, 283. She explained that a fire at the coal mine led to its closure and reclamation in 1993, at which time, after some sales of rock dust to other coal mines, the quarry went into "standby status." Id. at 283-84, 343. MCR went into bankruptcy. Id. at 350. She noted that quarried material from the Mid-Continent Quarry had been sold for use as a scrubbing agent at the Colorado Ute Craig Power Plant for purposes of treatment of sulfur dioxide, and that some amounts were sold from the quarry for "common-variety purposes, including, oh, road base, ballasts and the like." Id. at 284, 308; see also P. Ex. 13. She testified, from P. Ex. 13, that much of the material was sold for "qualifying end-uses," but that "other tons" on the exhibit, including sales of "ballast material" to Western Fuels, were common variety. (Tr. 309.) She testified that the uncommon variety minerals "went for acid neutralization in the power plant scrubbers and rock dust, recognized as qualifying end-use sales." Id. at 374. She testified that sales "recognized as common-variety sales" "were allowed [without] royalty" by virtue of a 1987 Solicitor's opinion. Id.; see also id. at 383.<sup>8/</sup>

Delaney testified that material stockpiled on the Chemin Nos. 5 and 6 mining claims should be viewed to be no different from that actually mined from the quarry for purposes of obtaining and marketing the high quality locatable rock dust. Delaney testified that the material from the quarry was mined, crushed, and screened for uncommon variety purposes. (Tr. 290-93.) She testified that the "fines material was sorted out and not used in the rock dust plant for the reason that the equipment was calibrated for a particular size consistency," and also because the fines material retained moisture, while rock dust needed to be very dry. Id. at 293. She testified that Pitkin made the decision as to which rock to put in the stockpiles based on size, and not quality. Id. at 297-98. In response to questioning by the ALJ, she conceded that the material in the stockpiles might be lower in quality than that at the quarry:

Q [BY ALJ] Couldn't it be that the nonlimestone material becomes heavier, if you will, and more of it comes into the fine material?

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<sup>8/</sup> Pitkin also presented evidence explaining the parties' agreement to escrow money for sales pending the dispute. (P. Exs. 24-29.) This is an agreement pending the outcome of this appeal and not controlling of any issue in it. (Tr. 334-35.)

A I think there probably is some soil and overburden material that was mixed in with it.

Q So it might be a lower value so far as –

A Somewhat, somewhat

(Tr. 377.) She then reversed herself, stating that “it’s the same material, and it should be just as valuable.” Id. at 378. She settled on the following position:

A \* \* \* I think, some – as I say, some overburden or soil material probably mixed in as part of the mine processing, but –

Q Which might reduce the –

A It’s the same deposit.

(Tr. 378.)

Delaney also introduced portions of an Environmental Assessment of Mid-Continent Limestone Quarry (EA) (P. Ex. 6). This document indicated that MCR had been operating a quarry and needed “approval to open a new quarry about ½ mile west of the present site.”<sup>9/</sup> Delaney noted that the EA indicated that the limestone at the Mid-Continent Quarry contained “90 to 98 percent calcium carbonate [] low in both silica and magnesium carbonate. Comparable limestone of this quality and magnitude is not present in any other horizon of the sedimentary section anywhere in Colorado.” (P. Ex. 6 at 10.)<sup>10/</sup> She cited this EA in support of her contention that the material in the stockpiles was no different from that in the quarries, and that the stockpiled materials must therefore be defined as locatable uncommon variety stone.

Delaney testified regarding the sales of limestone from the stockpiles. She explained that Pitkin sold material for 4 years to the Climax Mine, and also to the

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<sup>9/</sup> The portion of the EA in our record is undated and is labeled “Exhibit F” for some purpose or proceeding other than this appeal.

<sup>10/</sup> In fact, this quote appears first on page 28 of a Dec. 8, 1964, report entitled “Limestone Deposit of Basic Chemical Corporation, Glenwood Springs, Colorado,” prepared by John W. Vanderwilt for the then mining claimant, Basic Chemical Corporation. Vanderwilt’s report is attached to a 2000 letter from Pitken to BLM; the quote actually relates to the Leadville formation as it was then exposed in cliffs at Glenwood Springs. (P. Ex. 25 at 21.) On cross-examination, Delaney conceded that the language did not specifically relate to the Mid-Continent or Marblehead Quarry, but rather to the then in situ deposit north of Glenwood Springs. (Tr. 361-62.)

Henderson Mine, both owned by Phelps Dodge. (Tr. 328.) She testified that Pitkin had a “new purchase order from another mining entity, the Phoenix, for \$25 – \$24 per ton FOB the mine.” (Tr. 329.) Delaney introduced Pitkin’s sales summary, which she had prepared (P. Ex. 46); invoices of sales to Phelps Dodge running from \$28 - \$32 per ton (P. Ex. 32); trucking invoices Pitkin paid at \$15-\$18/ton (P. Ex. 31); and a sales contract to Henderson for “calcium carbonate fines (3/8 minus)” for “use on 3-Dam reclamation.” (P. Ex. 41.) The sales summary shows eight sales to Climax Mine, totaling 4,186 tons between 2000 and 2003, with load and truck costs of \$12-\$17, and what is listed as “profit” of \$8.43-\$13/ton. The sales summary shows a single sale to Henderson of 443 tons, with a purchase order of \$35/ton, an actual sales price of \$32/ton, and “profit” of \$14/ton. Delaney testified that Phelps Dodge had offered \$35/ton for the material because it was “a little farther” and the cost of trucking and loading was \$18, but that she unilaterally lowered the sales price to \$32 for “good customer relations.” (Tr. 367.) <sup>11/</sup>

The sales summary lists a purchase by “Phoenix” of 30 tons at \$24 FOB. A purchase order from Phoenix is included in the record, however, asserting that Phoenix would pay \$24/ton for crusher fine and for “rip rap” “plus shipping.” (P. Ex. 42.) Delaney testified that Phoenix intended to pay for the shipping costs (Tr. 341), and that the \$24-25 “included the cost of shipping.” (Tr. 371.) The record is unclear where the delivery point was to be and raises questions regarding whether the price was properly identified as “FOB,” as indicated by the ALJ’s difficulty in understanding the potential Phoenix sale:

Q (BY [ALJ]) I’m confused now. \* \* \* Price delivered is \$25 under Exhibit 46. The costs of shipping a loaded truck is \$12.

A Yes. The difference –

Q So the profit –

A – is 13.

Q – is 13?

A Yes.

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<sup>11/</sup> The record is not entirely clear regarding who paid costs of hauling and loading the material. The \$28-\$30 sales prices to Climax Mine, and the \$32 sales price to Henderson, clearly, however, include hauling and loading costs.

Q The profit is the cost then of – \* \* \* the value is not \$25 per ton, but rather \$13 per ton, the value of the material, because shipping is \$12; am I correct in that?

A Uh-huh.

(Tr. 372.) <sup>12/</sup>

The sales summary shows a road base sale to a company called “Dirt ‘n Iron,” of 962 tons at \$4.61/ton. Though Delaney did not take off any escrow payment for the sales to Phelps Dodge, for this sale to “Dirt ‘n Iron” she subtracted \$2.80 in BLM “royalty payment,” thus reducing the “profits” for the sale to \$1.81. (P. Ex. 46.) <sup>12/</sup> Delaney testified that the Dirt ‘n Iron sale had nothing to do with the Chemin Nos. 5 and 6 mining claims. (Tr. 358, 380.) She testified that the sale to Dirt ‘n Iron was from the Marblehead Quarry for road base, and that the purchaser “could get material FOB other aggregate sites at \$6 per cubic yard, which translates to \$4.61/ton.” (Tr. 331-33; see also P. Exs. 39 and 40 (Dirt ‘n Iron contracts for “previously mined material from the Marblehead Quarry”).) She testified that an inducement for the sale was that the fines material was piled in an unstable manner at or near the Marblehead Quarry, and needed stabilization. (Tr. 345.)

Delaney testified that the Marblehead Quarry had lower quality limestone than the Mid-Continent Quarry. (Tr. 352.) She acknowledged that, on behalf of Pitkin, Lewicki attempted to sell 75% calcium carbonate material to the Climax Mine but was unsuccessful. (Tr. 353; P. Ex. 24 at 5, June 8, 2000, letter from Lewicki to Climax (offering, inter alia, 75% calcium carbonate for \$20.40/ton).) She asserted that this 75% material was from the lower quality Marblehead Quarry and that she had “declined to sell the [fines piles]” on the Chemin Nos. 5 and 6 claims because they were “so much more valuable.” (Tr. 380.)

<sup>12/</sup> Judge Holmes stated, “I’ll take your word for it at this time, but it takes some searching.” (Tr. 371.) We share his skepticism as to the listing on the sales summary of the alleged Phoenix sale at \$24/ton. As best we can determine, that proffer of a price should be listed on the sales summary as the “Price Delivered” to be consistent with the Phelps Dodge sales, and not as a “Price FOB.” (P. Ex. 46.)

<sup>13/</sup> Judge Holmes objected to Delaney’s attempt to compare sales prices of \$4 and \$25, and asserted that the proper price comparison is between the \$1.81 for road base and \$13 for the sale to Climax Mine. (Tr. 372-73.) Judge Holmes was correct to object to Delaney’s comparison, but his, too, was in error. The \$13 sale to Climax Mine did not account for the \$2.80 subtracted from the sale price for road base material (\$4.61/ton). The proper comparison is between \$4.61 and \$13, or \$1.81 and \$10.20 (\$13-\$2.80). Pitkin’s witness Lewicki acknowledged that a proper economic analysis should reduce the “profit” figures by \$2.80/ton. (Tr. 454.)

This testimony, however, does not correspond to her own July 10, 2000, letter to BLM, in which she asserted at pages 2-3, that the EA language referring to the significance of the deposit related to “the (upper, Marblehead) quarry since 1974 \* \* \*. BLM’s EA discusses the unique and special character of the deposit \* \* \*. A 1964 report by John W. Vanderwilt, prepared for the Basic Chemical Corporation, which was quarrying rock for other uses from the area of the upper, Marblehead Quarry, makes the same statement.” (P. Ex. 25 (July 10, 2000, letter from Diane Delaney to BLM at 4.) Thus, in her letter to BLM in 2000, Delaney not only specifically identified the Marblehead Quarry as one of the most valuable quarries in the State, she also cited the Vanderwilt report as relating to it. In her testimony she contended that the Vanderwilt report relates to the Mid-Continent Quarry. As best we can determine, Delaney’s testimony was an effort to deflect attention from Pitkin’s attempts to sell 75% calcium carbonate material to Climax Mine, a fact that supports the Government’s contentions regarding the lower value of the stockpiled materials. Delaney’s testimony relegates the 75% material to the “lower value” Marblehead Quarry stockpiles, contrary to other record evidence.

Pitkin submitted results of a 2003 sampling program of the “stockpiles and unmined material” at the “Mid-Continent Quarry” conducted by Lewicki. (P. Ex. 44.) Results of samples taken from the stockpiles are combined with results taken from highwalls at the quarry itself. The samples from the relevant stockpile were numbered 9, 10, 12, 13 and 14. (Tr. 426 (Lewicki).) Lewicki testified that those five samples would not be sufficient in number to constitute a statistical representation of the entire pile, but that “when you combine those results with all the other results that are all in the same, area, you start to get a better picture.” (Tr. 455.)<sup>14/</sup> No samples were taken from the lower stockpile, though one sample (number 11) was taken from the small, 400-ton stockpile. Samples 1 and 2 were taken from rip-rap piles not at issue, and samples 3-8 were taken from benches at the quarry site. See P. Ex. 44 (Limestone Survey, Plan View Map, 10/22/03). Samples from the stockpile ranged from 89.4% to 93.4% calcium carbonate, and 1.12%-1.8% magnesium carbonate, when tested, using a C25 test, by Hazen Research, Inc. (Hazen). (P. Ex. 44; Tr. 428 (Lewicki).) Notably, however, Hazen transferred these same samples 9, 10, 12, 13, and 14, to Arrakis, Inc. (Arrakis), whose results were lower than Hazen’s. (P. Ex. 47.) Arrakis’ “XFR analysis” results showed results from 84.36% to 92.75% calcium carbonate, averaging 89.4%, and .47% to .65% magnesium carbonate. Id.; Tr. 428.<sup>15/</sup> The samples in the quarry highwall, by contrast, ranged from 90.9% to 98% calcium carbonate, with .297% to 6.94%

<sup>14/</sup> Pitkin supplied no explanation for why, after the Board ordered representative sampling, it conducted sampling that, according to Lewicki, does not qualify as such.

<sup>15/</sup> The exhibit lists “CaO” and “MgO,” but Lewicki testified that this was error, and that the numbers represented calcium carbonate and magnesium carbonate.

magnesium carbonate. Lewicki testified that the five samples had a higher silica content than he expected. (Tr. 456.)

With this background regarding Pitkin's sampling, Delaney conceded that Pitkin's test results, and some sampling conducted by Climax, had "generally come up at 91 percent" calcium carbonate (apparently relying on the Hazen and not the 89% Arrakis figures), which was a lower value than at the quarries. (Tr. 382.) But she persisted in asserting that the values of the stockpiles and the in situ quarry material are the same, relying on the higher values of the 1994 BLM grab samples repudiated by this Board in Mid-Continent. Id.

Lewicki testified that the Marblehead Quarry had "a consistently lower quality in calcium carbonate than the lower quarry, which is known as the Mid-Continent Quarry." (Tr. 394.) Nonetheless he stated that the deposit itself, found in both quarries, is "the best deposit of limestone that's known" in Colorado. Id.<sup>16/</sup>

Lewicki testified that he conducted a market study and located "quite a few" potential purchasers for material from the stockpiles. (Tr. 402.) He stated that the market specialist at the Tri-State Generating Station power plant was "thrilled because he thought initially that we had reopened the mine." (Tr. 394.) He testified that he told the market specialist that the mine had not been reopened, and that "we have this material that's in the stockpiles." (Tr. 395.) He testified that Pitkin "didn't even try" to sell its stockpiled materials to Tri-State because the "test burn required so much material, that's all we could have supplied him was a test burn." Id.<sup>17/</sup> Tri-State was buying limestone for its power plant from the "much closer" Maybell Quarry. Id. Lewicki testified that he contacted the "20-Mile Coal Company" and a "large longwall mine by Paonia, Colorado. And they were extremely interested in us possibly supplying them with rock dust." (Tr. 402.) He testified that Calco was the "only real supplier" of rock dust and was charging an "extremely high price" which was \$40/ton. Id. Lewicki asserted that Calco's material was "more than 87% calcium carbonate, and less than 11% magnesium carbonate." Id. Notably, however, for this quality of material Calco's charge "for 10,000/Tons or more would be \$14.00/Ton. Ag-Lime \$24.00/ton." (Lewicki Report, P. Ex. 33 at 22 (Calco price list

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<sup>16/</sup> Lewicki introduced exhibits related to 1984 sampling of the quarry site. (P. Exs. 49 and 50.) Nothing appears in our record under tab 49. A map appears at tab 50, and shows drilling which took place on the quarry site on what is now located as the Chemin No. 2 mining claim. Lewicki testified that the quarry samples from 1984 showed "95, 94, 98, certain areas are 97. There's even one 100, 98, 98, 99." (Tr. 398.) It is not clear, given the absence of Ex. 49, whether the numbers he cites refer to calcium carbonate or total carbonate material.

<sup>17/</sup> Later, when asked whether the limited size of the fines piles had any affect on the ability of Pitkin to market the materials, he asserted "absolutely not." (Tr. 437.)

for “Limestone Typical Chemical Analysis”).) The reference to “Ag-Lime” is not clear, nor is at all clear what quality of material Calco would have sold for \$40/ton.

Lewicki testified that other consumers of rock dust told Lewicki of the significance of the Mid-Continent Quarry: “The coal users said that the Mid-Continent limestone was better and that they would prefer us to supply them. We said we couldn’t because we don’t have the mine to start up.” (Tr. 403.) <sup>18/</sup> Lewicki testified regarding the Leadville project of the EPA, but “he said to me \* \* \* [w]e would have loved to entertain a price from you, but we just finished the project.” (Tr. 406.) Later, he asserted that an EPA employee he spoke to “would have been really interested” and “would have entertained – if I had called him three months earlier, there’s a possibility we could have sold material to him.” (Tr. 441.) The Resurrection Mine, “expressed interest, but they said they couldn’t place an order at the time.” (Tr. 407.) Newmont “also expressed interest, but again, they had done a lot of their major work already.” *Id.*; see also Lewicki Report (P. Ex. 33; Govt. Ex. 5).

Lewicki testified that, in order to market materials to the Climax Mine, he took representative samples to Romig, and that Romig analyzed the results appearing in P. Ex. 24. (Tr. 399.) Lewicki testified that the samples from the fines stockpiles were 91.1% and 92.1% calcium carbonate. (Tr. 400.) Ex. 24 shows three sample results (3, 4, and 5) of “quarry fines” from the stockpiles, ranging from 87.1% to 92.1%. It also shows two samples from the “lower quarry” or the Mid-Continent Quarry as 98.6% and 99.8% calcium carbonate. (P. Ex. 24 at 3.) Lewicki testified that the total carbonate material from the stockpiles should be considered to be higher than represented in P. Ex. 24. Speaking only of the two higher grade samples from the quarry fines and omitting the 87.1% sample from the “upper quarry fines,” he stated:

A Now, those – I should point out that those samples are strictly the calcium carbonate content and, you know, the way it was earlier, the measuring stick that was used earlier is 95 percent, was a combined calcium and magnesium carbonate.

And based on other tests that we know, we feel pretty confident that the magnesium carbonate content of that material is another 1.5 percent. So if you take the average the way it exists right there, it would be 91.6, just calcium carbonate, of the two samples.

If you add 1-1/2 percent of magnesium carbonate to it, then you’re averaging 93.1 percent \* \* \* total magnesium and calcium carbonate.

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<sup>18/</sup> At this point, Judge Holmes interrupted the witness on an unrelated topic. Testimony to explain why, with such strong support for the quarry, the potential purchaser was not interested in buying material from the stockpile was never elicited.

(Tr. 400.) Lewicki excluded sample 5's lower value of 87.1% calcium carbonate from this analysis. Lewicki testified that, even though the sample is identified as deriving from "fines" material, as are samples 3 and 4, sample 5 was from the Marblehead Quarry itself. Nothing in the record verifies where sample 5 was taken. (Tr. 401.) <sup>19/</sup> He testified that the samples relevant to his testimony were taken by digging down the "top few inches" and putting materials into 5-gallon buckets. (Tr. 448.)

Lewicki testified that his 2001 market study (the Lewicki Report) concluded that the stockpiled material could not supply a market for stack gas reduction "because of the limited amount of material and also the size" and the purchasers "also said that they preferred 95 percent calcium carbonate." (Tr. 409.) He testified that power plants would use quarry material "if the mine started up again." Id. He testified that there was no cement market for limestone because "the same company operates the limestone kiln that makes Portland cement that has the limestone quarry." (Tr. 410.) Effectively all cement kilns had a captive supplier. His study showed that reclamation was the most profitable use he could find for the fines. (Tr. 412.)

Lewicki testified that use of limestone to offset acidic soils in reclamation should be seen to be equivalent to an uncommon metallurgical use of limestone in cement or smokestacks and power plants because the chemical reactions and equations defining them are the same. (Tr. 414-15.)

Q \* \* \* Climax uses it to neutralize acid in the soil. And I guess when the limestone is placed in smokestacks and power plants, it's also there to neutralize acid; is that right?

A Exactly right. When coal burns, it has pyrite in it, which is iron sulfide. That iron sulfide oxidizes and produces sulfur dioxide gas, and if – if that is not contained, the power plant will be out of compliance with their air emissions permit.

That SO<sub>2</sub>, sulfur dioxide that would come out [of] the stack would then combine with water vapor and then would go back into the soil and the water as sulfuric acid.

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<sup>19/</sup> BLM counsel attempted to elicit a straight answer. Lewicki conceded that sample 5, with a content of 87.1% carbonate, is identified in P. Ex. 24 as taken from a "fines" pile, but he denied that this is correct, asserting that P. Ex. 24 is to be discounted because sample 5 actually was taken from the Marblehead Quarry. (Tr. 447.) He proceeded to acknowledge the lower "fines" pile of 7,000 tons. Id.

Well, that's the exact same reaction that takes place when the sulfides at a metal mine [sic], like Climax has, they have – they had a metal mine. They mined a huge volume of material that had sulfides in it. They extracted the molybdenum, and a lot of the waste material has still some sulfides in it.

Well, those sulfides, just the same way as what happens when you burn the coal, they oxidize. And then when they oxidize, they produce sulfuric acid. And sulfuric acid, when released into the soil and water, is extremely dangerous, and it will prevent good reclamation from taking place.

So the purpose of the limestone in both cases is to exactly do the same thing, which is to neutralize the sulfuric acid.

(Tr. 413-14; see also P. Ex. 23 (chemical reactions identified on exhibit prepared and introduced by Lewicki).)

Lewicki testified, like Delaney, that the miners at the quarry did not attempt to sort material by quality. (Tr. 416.) He acknowledged that “scientifically” the stockpiles had a lower quality than the quarry materials. (Tr. 457.) He stated, however, that the miners had sorted from the quarry by size: “They produced the other two sizes, which they sold to the power plant and then the other size went for rock dust and the rock dust plant. So at the time, they didn’t have a market for the fines.” (Tr. 450.) He acknowledged that the stockpiles contained lower quality material than the mine, explaining, as did Delaney, that “they could have possibly mixed a little bit of soil with the material.” (Tr. 417.) He asserted that wind may have blown dust and dirt on the stockpiles, and water may have eroded it. (Tr. 418.)

Lewicki conducted a feasibility study for more mining at the quarry. (P. Ex. 45.) This study identified mining costs, and concluded that the higher quality of calcium carbonate in situ at the quarry site would bring “\$2.50 above the current sales price” for the stockpiled materials.

[T]he cost to mine, crush, and stockpile limestone would be \$6.97 to \$7.97 per ton. Assuming the current sale price of \$13.00-\$14.00 per ton, the profit for the limestone sale would be \$5.03-\$7.03. The current sales price is based on 91% CaCO<sub>3</sub>. New mining will only occur in the higher grade areas of the seam, therefore, the CaCO<sub>3</sub> content will be 96-99% CaCO<sub>3</sub>. This would make the Mid-Continent Quarry the highest quality limestone producer in the State of Colorado. The price for the higher quality limestone is estimated to be \$2.50 above the current sales price. This increase in sales price would

increase the profits to \$7.53-\$9.53. To place these profits into perspective with sand and gravel, companies tend to set their f.o.b. prices with 10% being profit. Most sand and gravel varieties range between \$3.50 and \$10.00 per ton with their expected profit being \$0.35 and \$1.00.

(P. Ex. 45 at 2; see also Tr. 421-22.) Lewicki testified that the prices for common variety sales were generally \$3.50-\$10, which then, inexplicably, “really sells for between \$3.50 a ton and \$6 a ton,” with profits of \$.50/ton, though it is not clear what costs he was considering to reduce the receipts. (Tr. 423.)

Lewicki attempted to explain why the Government’s 14 samples taken from the stockpiles assayed at a lower quality. He noted that the samples were taken on a rainy day. (Tr. 434.) He asserted that any laboratory conducting the analysis would be required to dry the samples. Lewicki concluded that the BLM samples must not have been dried because the 2001 BLM sampling form listed the “weight received”:

If you look at all – if anybody looks at all the sampling that’s been done on this site, the sampling that’s been done by Climax, the sampling that’s been done by us in 2001, the sampling that’s been done by BLM in 1994, the sampling that was done by Arrakis, and our Hazen analysis that we just did, we get an average of all those – they’re all right in the same ballpark, 91.6, and Arrakis’s was 89.4.

And now you have this other set of samples sitting out there from BLM in 2001 that have “weight received,” which indicates that they measured – they measured the water content in this sample.

(Tr. 436.) <sup>20/</sup> The 1994 Grand Junction Lab assay (P. Ex. 19), lists calcium carbonate and “total carbonate” for each sample. The 2001 Grand Junction Lab analysis lists, for each sample, “calcium carbonate,” “magnesium carbonate,” and “weight received.” (Govt. Ex. 1 at Attachment 11.) As we understand his testimony, Lewicki inferred from this latter entry that the 2001 samples contained water and that the Grand Junction Lab did not properly dry the samples. On cross-examination, he was asked: “Do you, in fact, know if the Grand Junction Lab that handled the test for the BLM did or did not dry the materials before it tested them?” He responded: “I don’t.” (Tr. 449.) In response to questioning from the Judge, Lewicki denied contending that the “samples were not good.” (Tr. 459.) He said, “you gotta raise a question about it” and that the analysis at the Grand Junction Lab was different.

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<sup>20/</sup> Lewicki later asserted that the “requirement of the rock dust plant to have no moisture was so strict” that the “fact that there are fines alone would – by the simple nature of the size, they would have some more moisture in them.” (Tr. 444.)

(Tr. 459-60.) When queried what he meant by “different,” he said “I don’t know for sure. But the only explanation I can come up with is that in the ‘94 testing that Grand Junction Labs did, they don’t list ‘weight received.’ So that means to me they dried the material.” (Tr. 460.) Lewicki speculated that the Lab did not dry the material, because 8 years later the information provided on the analysis form identified “weight.” He did not express an opinion regarding the difference between the 1994 and 2001 analyses in their reporting of magnesium carbonate (the 1994 analysis did not).

Lewicki testified that the material in the stockpiles is unique “because its calcium carbonate content, size content, size consist, and location give it a much higher premium over common varieties, as is evidenced by the price” and that this gave it “distinct and special value” over common varieties. (Tr. 438.) Calcium carbonate content is “the most important factor.” (Tr. 450.) He did not, however, indicate a quality of limestone to which he was making his comparison.

Romig testified extensively regarding the nature and location of the Climax Mine, and introduced visuals of and an article about the reclamation operation there. (Tr. 469-72, 474-91; P. Exs. 51 and 52.) He testified that the Climax Mine purchased stockpiled materials from Pitkin “primarily as the base for soil neutralization, as a soil development amendment in a precursor to other amendment additions for reclamation.” (Tr. 473.) Romig testified that the reclamation project applied “biosolids” or “sewage sludge” to “an amended wasterock material.” (Tr. 481.) He testified that in 1999 and before, he was “experimenting with different means of application” and the reclamation project used limestone from Calco and a quarry in Fort Collins. (Tr. 482, 483.) He testified that products from those companies were “of limited applicability.” (Tr. 483.) “[A] big issue there was the fact that I was seeing costs of application in the \$4- to \$5,000-per-acre range for the actual lime application ahead of the costs of applying biosolids.” (Tr. 483.) <sup>21/</sup> Romig testified that a difficulty with the Calco limestone was that “[t]he service was somewhat poor” and Calco sent material with an “inconsistent size” that damaged the spreader machine (Tr. 493-94), and the material had not been screened like Pitkin’s. (Tr. 506.) He testified, however, that he had used Calco limestone with success for “the first couple of years.” He testified that he had encountered a problem with revegetation in a “particular spot” using Calco limestone, for no apparent reason. (Tr. 494.) It was \$35/ton, from about the same distance away as Pitkin’s stockpiles, and thus he paid more for the Calco limestone. (Tr. 499.)

Questioned whether Climax intended “to continue to use the Pitkin Iron limestone” for reclamation going forward, he stated: “At this point, yes.” (Tr. 490.)

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<sup>21/</sup> As best we can determine, Romig never explained the per-acre cost for use of the Pitkin material.

He testified that he would anticipate future needs of 800-900 tons per year. Id. He testified that the Climax Mine was “working on the compost program” that could “increase demand for limestone” at an unidentified future point. (Tr. 486.) He also stated that Climax might allocate more money in 2009 “or thereabouts” for reclamation, and “may” have to stockpile some limestone for that project then or sometime before. (Tr. 496 (“I may \* \* \*.”).)

Among the three providers, Romig was asked which he preferred to use. He stated: “I’m a customer of Pitkin Iron’s and I’m happy to be that. I’m finding a good product at a good price and exceptional service there.” (Tr. 495.) Later he said, “There are other limestones around, but the quality of the material out of the Pitkin Quarry is – meeting the need, it’s economical, and it’s close at hand for the use we’re taking it to.” (Tr. 497.) The following colloquy took place:

Q And just cost aside, is it true that you like the Pitkin Iron limestone better than the Calco limestone anyway?

A I do, and that comes with the fact that I’m – I’m getting good service as well from Pitkin.

(Tr. 499.) He said the Pitkin limestone is “worth the price” but that, if Pitkin were unable to supply the Climax mine, he would “have to find other sources.” “I would have to go elsewhere.” (Tr. 500.) He said if he could get a better deal, he would. Id.

Romig testified that it was “too early to tell” whether the Henderson mine would again buy Pitkin limestone. (Tr. 502.) He testified he did not wish to use the material at the Sherman Mine because it was higher in magnesium carbonate causing a corresponding loss in efficacy of the calcium carbonate and increased costs. (Tr. 503.) He also stated that he did not use gravel from the nearby Jones Pit which would be free to Climax, because it was not limestone. (Tr. 504-05.)

Romig was vague about the quality of the limestone Pitkin supplied or that the project needed. He testified that he looked at the quality analysis done in 2000 (P. Ex. 24), and that there had been other sampling analysis that he “was not able to locate” and he “[didn’t] recall the exact number, but it was in the 89 to 92 percent range.” (Tr. 498.)

[4] Looking at Pitkin’s rebuttal presentation, we find that it did not preponderate against the Government’s prima facie case. Stripping Pitkin’s case of speculation and characterization of the intentions or opinions regarding Pitkin’s limestone of entities that did not appear at the hearing, the company actually supplied very little by way of evidence of a market for its stockpiled materials as a unique product with distinct and special value. There is no place in our analysis for

the many allegations in Pitkin's rebuttal case of purchasers that "would have" bought the material under different circumstances. Nor is there any place for Romig's assertions that he "may" have more of a market 6 years or more in the future, particularly given that he did not ever say that such a future market would be for limestone from the claims in question. After an extensive market analysis conducted in 2000-01 by Lewicki to find a purchaser for the stockpiled materials, all that Lewicki documented is that he received courteous comments and identified a small market for approximately 800-900 tons/year at the Climax Mine for at least 4 years, that might possibly continue for an unspecified period.

Looking at this market or end-use, we begin with the Department's specification in United States v. Pierce, 75 I.D. at 260, that a "present profitable market" "must be a market based either upon the use making the limestone an uncommon variety \* \* \* or upon the use of the limestone for the same purpose that a common variety of limestone would be used for, but in the latter event the limestone would have to possess a unique value for such use which would be reflected in a higher price for the limestone than a common variety would command \* \* \*." (Emphasis added.) Though this old test pre-dates the McClarty standards and was premised on lack of a discovery, we find it a useful articulation of two distinct elements of the common variety analysis upon which to focus Pitkin's rebuttal case and frame our conclusions.

We find Pitkin's case to focus largely on the first element of the Pierce test. To determine whether the Climax Mine constituted a market based on a "use making the limestone an uncommon variety," we look to the regulations in effect at the time of the hearing, and at the time of the briefing and decision in the appeal. The regulations in effect in October 2003 specified that common varieties were deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct and special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties if a particular deposit has distinct and special properties making it commercially valuable for use in a manufacturing, industrial, or processing operation." 43 CFR 3711.1(b). "Limestone suitable for use in the production of cement, metallurgical or chemical grade limestone, gypsum, and the like are not 'common varieties'."

The market use described by Romig was "primarily as the base for soil neutralization, as a soil development amendment in a precursor to other amendment additions for reclamation." (Tr. 473.) It does not call for "metallurgical or chemical grade" limestone, and Romig conceded this. (Tr. 498.) Though Pitkin quarrels with BLM regarding the meaning of "cement use," no evidence reflects use of the stockpiled material for cement; to the contrary, Lewicki specifically testified as to the

lack of a cement market for limestone because cement companies have captive quarries. (Tr. 410.) For the only use proffered by Pitkin – a soil development amendment in a precursor to other amendment additions for reclamation – BLM demonstrated that it was a use for widely available limestone and that Pitkin limestone did not command a higher price or exhibit a particular economic value. Rather, Pitkin was able to undercut sales from other companies so that Pitkin’s supply was particularly “economical” for the Climax Mine only by failing to include the costs Pitkin had incurred to mine it. Pitkin’s and BLM’s cases both support the notion that Pitkin was paid no premium for the product’s use as a soil amendment. Accordingly, under 43 CFR 3711.1(b) (2002) the market was not, as a regulatory matter, a use making the material uncommon, and the question that must next be answered is whether the material itself met the McClarty test.

Under the rule promulgated in 2003, the same outcome pertains. Under 43 CFR 3830.12(d), the use of the limestone at the Climax mine is not metallurgical or chemical. There is no other “use” identified in that rule that makes limestone per se “uncommon”; accordingly, to prove that it is an uncommon variety, Pitkin must show that the material meets the test of McClarty, as adopted in 43 CFR 3830.12(b).

Pitkin nonetheless contends that its ability to develop a small market for use of the stockpiled material as a soil additive at the Climax Mine converts its stockpiles, which it concedes can be sold for a common variety road base use, to locatable limestone because use of material as a soil additive makes the material per se an uncommon variety. The Government contended that use of limestone in reclamation or as a soil additive for acid reduction was not uncommon, presenting testimony and other evidence regarding a number of projects where limestone was used for acid neutralization of mining and other spoils. Drew testified that there was “no scarcity” of limestone in Colorado for this purpose, and effectively that there was no scarcity of such sales. He testified as to examples of use of limestone for acid reduction in soil at the Sherman mine (300,000 tons of 92% calcium carbonate range); at the Black Cloud Mine (40-50,000 tons); by the Colorado DMG at an abandoned mine site; and by EPA for use on the Arkansas River. (Tr. 230-35.) Drew testified that BLM has issued “free-use” permits to counties, state governments and agencies to use such limestone as a neutralizing material. (Tr. 234.) Pitkin’s evidence did not refute the existence of these markets. Thus, use of limestone for acid neutralization at mine reclamation projects is not itself infrequent (to avoid confusing the situation by using the word “uncommon”), but Pitkin argues that the fact that the soil additive market, created for such limestone by environmental protection rules, can command a higher price than road base markets means that limestone used for such purposes is an uncommon variety of limestone. Pitkin thus asks us to decide, as a matter of first impression, that use of limestone as a neutralizing agent for acid reduction in soil or mine spoils is one that calls for an uncommon variety of limestone.

We begin our response by first explaining that the point of the Common Varieties Act was to close to location common materials, not to open or expand the class of materials that could be located, as Pitkin's position would have it, when only a limited set of uses (chemical grade, metallurgy, and cement) have heretofore been recognized as making limestone per se locatable. Second, Pitkin's position would give rise to the idea that if a claimant can show an acid-base reduction chemical reaction, the limestone is locatable under the Common Varieties Act. See Answer at 27 ("BLM has not demonstrated that acid neutralization is or has ever been categorized as a common variety use.").

Putting Pitkin's argument into the framework of McClarty, as adopted in 43 CFR 3830.12(b), however, reveals its infirmities. That test requires comparison of a mineral deposit with "other deposits of such minerals generally"; proof of "a unique physical property" in the "mineral deposit in question"; and a determination of whether the unique property gave the deposit a unique and special value. 43 CFR 3830.12(b)(1) through (3).<sup>22/</sup> Pitkin did not make the first comparison with other deposits, nor did it show anything unique about the mineral deposit in question, such that the "deposit" has a unique and special value. It leap-frogs instead to the fifth part of the test and contends that "the distinct and special value is reflected in the higher price that the material commands in the market place." Id. at 3830.12(b)(4). Effectively, Pitkin contends that if mining claimants can identify a use of limestone that commands a higher price than certain other uses all concede are ordinary, the claimant need not prove the first three parts of the McClarty test.

We reject this construction of the test. A claimant cannot avoid the necessity of proving that a deposit is uncommon; without that element, the claimant could elevate to "uncommon," locatable status large quantities of common stone merely by showing a market in which purchasers will pay more for common stone. That, we believe, is contrary to Congressional intent. The Common Varieties Act states "[n]o deposit of common varieties \* \* \* shall be deemed a valuable [locatable] deposit" under the mining laws. Pitkin confuses uncommon stone with merely valuable stone. Common materials can have high and increasing value with changing economies; the change in value does not render what was common "unique," it renders what was common more expensive. The fact that common variety stone may command a price similar to sales of per se uncommon variety stone does not, ipso facto, convert what is common to uncommon status. In LeFaivre, we held that "in order to qualify as a

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<sup>22/</sup> The fourth part of the test requires a determination regarding whether, if the material is put to a use "to which ordinary varieties of the mineral are put, the deposit has a distinct and special value for such use." 43 CFR 3830.12(b)(4). We address this question below, but, for purposes of addressing Pitkin's argument that the use of its limestone makes the stone uncommon, Pitkin's assertion is that use of limestone for acid reduction is not "one to which ordinary varieties are put."

locatable deposit under the Common Varieties Act, a deposit must meet two criteria: the deposit must have a unique property and the unique property must impart to the deposit a distinct and special value. See United States v. Thomas, 90 IBLA 255, 257 (1986); United States v. U.S. Minerals Development Corp., 75 I.D. 127, 134 (1968).” See also United States v. Heden, 19 IBLA 339 (1975), aff’d No. 77-3334 (9th Cir. Mar. 19, 1980) (“We hold that in comparison with the extremely large deposits of similar stone throughout the area, the stone herein concerned is not unique. United States v. Brubaker, 500 F.2d 200 (9th Cir. 1974); United States v. Stewart, [5 IBLA 39, 48, 79 I.D. 27, 31 (1972)], citing McClarty v. Secretary of the Interior, 408 F.2d [at 907]”). We therefore will not decide that a higher price for a use is the only proof a claimant must make regarding the deposit.

Pitkin is correct that evidence of a higher price available in the market can supply proof that a deposit has unique value; what Pitkin misses is that it must be evidence of the higher price the deposit commands, not the higher price some purchaser will pay for similar materials. We reject any test that would make the price available to many suppliers for a common use the arbiter of whether a particular deposit of stone is unique, such that stone that has been shown to be common is defined otherwise. Thus, Pitkin’s complaint (Answer at 21) that BLM is requiring Pitkin “to sell its limestone for substantially more than other locatable limestone before Pitkin’s limestone will be locatable” misunderstands that the critical factor is the nature of the deposit, not the price. The price may be evidence regarding the nature of the subject deposit, but it is not solely determinative of the unique nature of the deposit, which must be shown in the record. <sup>23/</sup>

This holding answers Pitkin’s complaint that the Government allegedly compared the stockpiled limestone to what Pitkin argues, and Judge Holmes accepted, was locatable grade “similar limestone rather than ordinary limestone.” (Answer at 27, citing Decision at 7.) Pitkin contends that BLM could not properly compare the stockpiled materials to uncommon grades, and that BLM was instead required to compare it only to ordinary “common variety” stone. The problem with Pitkin’s argument, and Judge Holmes’ adoption of it, is that use of such terms as “ordinary” and “common” for comparison begs the outcome and presumes agreement regarding what is and is not “ordinary.” Pitkin assumes that use of limestone in reclamation projects, because it can call for a higher price, makes the limestone uncommon and then objects to BLM’s comparison of the stockpiled material with material used in other such projects. This argument assumes the outcome Pitkin

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<sup>23/</sup> We acknowledge the difficulty this poses for a claimant with material that is common in nature, even where the price for it is high. This problem of proof is one caused by Congress’ decision to foreclose location of material that is common rather than material that is low-priced. Pitkin chose to sidestep any comparison of its materials with similar limestone generally at its peril.

hopes for – that Climax Mine’s use of the stockpiled material in reclamation projects constitutes an uncommon variety use. As Judge Hammett acknowledged in his opinion adopted in United States v. Knipe, the prima facie case comparison is to be made with “similar materials generally,” and it is only in a claimant’s rebuttal case that it “puts on evidence which tends to show that the material the government used for comparison was an uncommon variety.” 170 IBLA at 178, citing United States v. Vaughn, 56 IBLA 247 (1981). It is Pitkin’s prerogative to prove that the material to which BLM compared the stockpiles is uncommon variety, but it must do so in its rebuttal case. It is for the decisionmaker to decide where on the spectrum the subject material falls. That BLM made the comparison with material and uses not to Pitkin’s liking is not an inherent flaw in BLM’s case because the burden of rebuttal remains with the claimant, regardless of how the comparison stone is characterized.

Further, Pitkin’s complaint about improper comparisons is not supported by McClarty. As Judge Hammett pointed out in Knipe, 170 IBLA at 179, the deposit is compared with similar materials in general under 43 CFR 3830.12(b)(1). The only part of the test that requires comparison of prices is the fifth element where: “(5) the distinct and special value must be reflected by the higher price which the material commands in the market place.” This element does not limit comparison of the stone in question to “ordinary” varieties because, in fact, the McClarty test was devised to resolve a dispute between parties over what constitutes a common variety. Imposing the test that Pitkin demands would require some agreement on that point before we could accept the parties’ evidence. The word “ordinary” appears in the McClarty test only in the fourth element: “(4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use.” 43 CFR 3830.12(b)(4). This is the question presented to us.

BLM contends that the use of the stockpiled materials is a use for which ordinary varieties of limestone are put, and that Pitkin has shown no distinct and special value for such use. Pitkin argues that use of the stockpiled material (and any limestone for acid reduction in mine spoils) is not one to which ordinary varieties of limestone are put. Pitkin attempts to avoid the very question we must decide by asking us to agree that BLM erred simply by virtue of addressing this aspect of the McClarty test at all. We disagree.

Moreover, to the extent the Government made comparisons of Pitkin’s stockpiles to other limestone generally, based on sales price, it relied on Pitkin’s price data; Pitkin therefore is in no position to complain that the Government did so. The Government properly pointed out that the sale to the Climax Mine at approximately \$13/ton is substantially lower than the Calco sale of what all parties concede is uncommon variety material in the range of \$30-41.50/ton and BLM would have been remiss had it failed to note the discrepancy.

Moving on to Pitkin's evidence regarding sales prices for its own comparison purposes, we find it convoluted and obscure. Pitkin's evidence of the single sale from the Marblehead Quarry to Dirt 'n Iron lists the price as \$6/cubic yard for 1,250 cubic yards, and the contract payment is listed as \$7,500 ( $\$6 \times 1,250 = \$7,500$ ). (P. Exs. 39 and 40 (Dirt 'n Iron contracts).) On the sales summary prepared by Delaney, however (P. Ex. 46), Pitkin lists the sale to Dirt 'n Iron as one for 962 tons of material, for \$4.61/ton, which equates to a sales price of \$4,434.82. Without a proper conversion factor for cubic yards to tons for the Marblehead Quarry material, we have no way of understanding the derivation of the \$4.61/ton figure or the discrepancy in payment. Delaney testified that it "could get material FOB other aggregate sites at \$6 per cubic yard, which translates to \$4.61/ton." This assertion does not explain the price and payment differential. Moreover, although this point is refuted by Pitkin's evidence regarding the value of the Leadville limestone vein, Delaney testified repeatedly that the Marblehead Quarry material was of lower quality than the material mined from the Mid-Continent Quarry. Without a way to compare the materials sold, we are left without tools to compare the prices of the materials or determine whether the allegedly higher value stockpiles would sell for substantially more, even as road base material. Further, the testimony that the Dirt 'n Iron sale was made to stabilize the Marblehead Quarry stockpile undercuts its evidentiary value, yet it is the only sample Pitkin provided as evidence.

We add to this the fact that the sales summary provides factors for the Dirt 'n Iron sale different from those for the Phelps Dodge sales. Though the Lewicki Report (P. Ex. 33 at 3) cited FOB prices for the Climax Mine sales, the sales summary left FOB prices blank, instead listing a "profit" column making FOB prices impossible to compare for the only "common variety" (Dirt 'n Iron) sale on the list. As noted above, Pitkin subtracted \$2.80 from the common variety sale profit, but did not do so for the Climax Mine sale, a mathematical decision which presumes the outcome of the appeal in its favor. Thus the comparability of the "profit" column is suspect. (P. Ex. 46.) In addition, the Mining Feasibility Study (P. Ex. 45) points out that the costs of mining are in the \$7-8/ton range; recognizing the mining costs would have reduced the profit column as well.

Other sales data is confusing. Lewicki testified that Calco sold chemical grade rock dust at the "extremely high price" of \$40/ton. (Tr. 402.) We cannot determine whether this figure is FOB the Calco limestone site, in which case the comparison is to the roughly \$13 for the Climax sale FOB price in Lewicki's Report at 3, or conversely includes costs which should be excluded. Lewicki reports that Calco was charging "\$30 per ton of bulk rock dust at the plant (not including trucking to a mine) and \$41.50 for the same rock dust packaged into bags." (P. Ex. 33 at 5.) The Calco material attached to Lewicki's Report (P. Ex. 33 at 22-24) quotes a price of \$14/ton for 98% carbonate, and 87% calcium carbonate. Lewicki asserts that this material is similar to that sold by Pitkin to the Climax Mine and sold by Calco at

\$14/ton FOB Calco plant. (P. Ex. 3 at 5.) The Lewicki Report states that the Calco plant is closer to Climax than the Mid-Continent Quarry (P. Ex. 3 at 5) and concludes that the quality from the Mid-Continent source must be higher, in contrast to Romig's testimony (Tr. 499) that Calco's and Pitkin's sources were about the same distance and he paid more for Calco's product at \$35/ton. Without information on trucking and quality of the Calco product, it is impossible to sort out these various assertions.

The evidence in the Lewicki Report about the Maybell Mine's sale of chemical grade material at \$13/ton FOB mine is equally vague. *Id.* at 6. A telefaxed letter from Maybell to Lewicki was attached as support. It does not address the grade of the limestone; rather, the faxed letter attached a limestone analysis referring to 96% limestone. The cover memorandum proposing a price states:

I have enclosed some testing results that might be useful. There is also A gradation of the 3/8" minus material, and as per our phone conversation, that material will probably not have as high calcium carbonate content as the 1/4" to 1" product.

The prices FOB the quarry are as we discussed.

1/4" to 1" – \$13

3/8" minus – \$5

(P. Ex. 33 at 14-16.) There is no indication of a unit price (\$/ton, \$/cubic yards).

At worst, Pitkin's data is difficult to verify and compare. At best, Pitkin's data is susceptible of the common sense interpretation given it by BLM in its Mineral Report. The lowest quality road base sales were in the \$4.50-\$4.75 range, perhaps notwithstanding quality, and the higher sales were for \$41.50. (P. Ex. 37 (Mineral Report) at 15.) In between, common variety limestone sold for landscape purposes for \$10/ton, limestone for use in cement for \$5 to \$7/ton, and Maybell sold some for \$13/ton. *Id.* at 15. All of this evidence shows, at best, that the price of sales to Climax was a few dollars higher than most sales of limestone conceded by all to be common variety and similar to or vastly less than sales of limestone conceded by all to be uncommon variety. This reasonable construction is not sufficient to preponderate on the question of whether the deposit in the stockpiles has a unique property, or a distinct and special value. Rather, that construction is undercut by Lewicki's Mining Preliminary Feasibility Study, looking into reopening the quarries. (P. Ex. 45.) As noted above, that study made clear that the distinct and special value of the deposit would be found on the quarries located on the Chemin Nos. 1-4 mining claims. The study acknowledged that mining there would "occur in the higher grade areas of the seam" with higher calcium carbonate than the 91% represented by

“current sales” and “would make the Mid-Continent Quarry the highest quality limestone producer in the State,” with a price “\$2.50 above the current sales price.” (P. Ex. 45 at 2.) Considering this study, we fail to find support in Pitkin’s price data for its assertions that the stockpiles on the Chemin Nos. 5 and 6 claims had any unique property, based strictly on price comparisons.

These conclusions do not yet, however, respond to two additional contentions that would make the limestone per se locatable notwithstanding the analysis above. First, Pitkin contends that the chemical process that occurs in the soil when limestone is used as a soil amendment is the same as that in metallurgy. Thus, Pitkin argues that we should find that the chemical reaction defining the use to which its limestone is put should be deemed metallurgy, rendering the deposit uncommon under the Common Varieties Act.

We refuse to equate use of limestone as a soil amendment with metallurgical use of limestone based on Pitkin’s assertion that they induce the same chemical reactions. “Metallurgy” is defined as the “science and technology of metals. Process (chemical) metallurgy is concerned with the extraction of metals from their ores and with the refining of metals; physical metallurgy, with the physical and mechanical properties of metals as affected by composition, mechanical working and heat treatment.” A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines (1968). Nothing in the process of soil amendment and reclamation at the Climax site constitutes metallurgy, and we will not fashion a rule providing otherwise.

Second, Pitkin relies on a line of decisions issued by this Board to characterize the soil amendment process as a chemical rather than “physical” one to support the conclusion that the end-use of its limestone at the Climax Mine must be defined, per se, as one calling for an uncommon variety of limestone. In United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); 13 IBLA 256 (1973) (erratum); aff’d, No. 76-182 (D. Nev. Nov. 27, 1978), the Board concluded that gypsite “is not non-locatable merely because it is used in agriculture to improve alkali soils.” 5 IBLA at 116. Adopting BLM’s reasoning, the Board stated that gypsite might be locatable if it had “some different chemical composition from similar materials that improve soils, other than to increase their friability and serve as fill material.” Id. Pitkin relies on language from that decision noting that “gypsite causes a chemical reaction on alkaline soils thus making them more productive. It is a chemical as well as a physical amendment of the soil condition \* \* \*.” Id. at 115. In a concurrence, Judge Steubing expressed misgivings:

Gypsum, a product of relative purity with a broad range of uses and products, quite clearly is locatable. Gypsite, on the other hand, consists of an incoherent mass of very small gypsum crystals or particles

heavily mixed with other materials of the earth such as clay, silt, silica, etc. Such gypsiferous material is extremely abundant and widespread.

The separation of the impurities in gypsite in order to obtain gypsum of the purity necessary for the manufacture of gypsum products is economically impractical with the low percentage of gypsum found in gypsite deposits such as those which are the subject of the case.

Other mineral materials which also have no particular use other than as soil additives, nutrients, conditioners or amendments have been held to be non-locatable. These include decomposed rhyolite, top soil, blow sand and peat. Although these materials may react differently than gypsite (some, perhaps, being even more beneficial), these other materials would seem to be in the same general category as gypsite which is useful only for the improvement of agricultural soils.

The production and use of gypsite involves simply scraping up the material from the claims, hauling it to wherever it is wanted, and spreading it on the ground without processing or beneficiation of any kind. It is merely a matter of redistributing material from where it occurs naturally to someplace where it is desirable to have it returned to the earth. In this aspect gypsite has much in common with a number of other non-locatable mineral materials such as fill dirt, road base and ballast rock. While all of the forementioned materials may serve beneficial uses and have commercial value, they have never been regarded as locatable minerals. From this standpoint even common brick clay, which the Department has always held to be non-locatable, is a mineral of a higher order than gypsite, since the clay is treated, processed and formed into a manufactured commercial product. The Department has never recognized marketability as the sole test of the validity of a mining claim. United States v. Mary A. Matthey, 67 I.D. 63, 65 (1960).

Nevertheless, I am compelled to recognize that these arguments are inadequate to contravene the well-reasoned and persuasive rationale of the main opinion.

5 IBLA at 130-31. The concurrence lays out succinctly the problem with attempting to establish a line defining whether a soil additive is locatable or not based on whether the process is a physical or chemical one. Judge Stuebing's seemingly contradictory conclusion that gypsite could be locatable is understandable only if viewed in the context of the fact that the Board did not find the deposit in question locatable, but rather remanded the case for a hearing.

In United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975), we faced competing testimony over whether soil conditioners containing iron ore, which apparently were a factor in improved agricultural use, met the test of Bunkowski. We concluded they did not because the claimant's "testimony that iron ore worked did not explain how it worked and did not establish by a preponderance of the evidence that the material meets the Bunkowski test for the locatability of minerals used as soil amendments." 21 IBLA at 387, 82 I.D. 424. In United States v. Beal, 23 IBLA 378 (1976), addressing ground potassium feldspar for use as a soil conditioner, we articulated the state of the test as follows:

A mineral used as a soil conditioner may be locatable under the general mining law if its addition to the soil results in a beneficial chemical change, but not if the change is only physical, i.e., improves friability. United States v. Bunkowski, supra. If the feldspar is chemically beneficial and valuable as a soil conditioner, the feldspar material would constitute a locatable mineral deposit under the general mining laws. United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975); United States v. Bunkowski, supra; \* \* \*.

23 IBLA at 395-96. Rather than directly apply that test, however, the Board proceeded to consider the evidence. The Government had argued that classification of material as either a fertilizer or soil amendment was required by Colorado's Commercial Fertilizer and Soil Conditioner Act of 1971. We stated:

[T]he feldspar sample did not have chemical qualities which would permit classification of the material as a fertilizer or soil amendment. This evidence went un rebutted by appellant \* \* \*. In view of this evidence we find that the Government established that the feldspar on the claim used as a soil conditioner did not satisfy the Bunkowski test, and was therefore not a locatable mineral deposit.

23 IBLA at 397. In United States v. Rukke, 32 IBLA 155 (1977), aff'd, No. 77-206 (W.D. Wash. June 23, 1981), we rejected a claimant's argument that use of material as a plant food to provide minerals absent from soil made the claims locatable, noting that evidence in support of the assertion was absent from the record. In Maurice Tanner, 141 IBLA 373 (1997), our latest pronouncement on the issue of a soil amendment, we found "humate" to be a mineral, not for purposes of locating it but for determining that it had been reserved to the United States in a Stock-Raising and Homestead Act patent, such that removal of it constituted a trespass against the United States. 141 IBLA at 382.

Pitkin contends that this line of precedent compels us to find that the quality of its limestone allows it to market it as a soil additive for its chemical, as opposed to

physical, qualities and that this use means that the deposit has a per se unique property, thus giving the deposit a distinct and special value. We refuse this invitation for three reasons.

First, as we have stated above, the point of the Common Varieties Act was to exclude common stone from location under the mining laws. While Pitkin's application of the Bunkowski line of cases is a plausible one, we reject it in the case of limestone because we do not believe the Common Varieties Act can be construed to have opened limestone to location any time a claimant can use an ubiquitous basic (as opposed to acidic) material for acid reduction. Nor do we believe that applying that line of cases to create such a result would be consistent with the Board's refusal heretofore to establish the locatability of such limestone.

Second, having set out the Bunkowski line of cases, it is notable that none of them actually concluded that the mineral in question could be located by a mining claimant. We think the cases attempted to leave open the possibility that a claimant could make a showing that a stone possessing a unique property that is used for soil amendment could be locatable, so long as it was not just used as fill material, but we will not read them as establishing a hard and fast rule that any material used for soil amendment can be locatable if the claimant can identify a chemical reaction taking place in the soil. Such a construction would highlight and implement the difficulties identified by Judge Stuebing in his concurrence.

Finally, we reject Pitkin's implication that it need not meet the test of McClarty if it can meet the test of Bunkowski. Even assuming that the point of Bunkowski at the time it was issued was to establish the chemical soil amendment test that Pitkin describes, such a construction of the Bunkowski cases is no longer possible in light of the adoption of the McClarty test in 43 CFR 3830.12(b). The rule is now this: if metallurgical or chemical grade limestone, or use in cement, cannot be shown, a claimant must preponderate with proof that its limestone meets the test of McClarty.

[5] This discourse demonstrates that Pitkin may not rely solely on the use of its limestone as a soil amendment to establish it as locatable grade. Pitkin could still show that the limestone is an uncommon variety even if its use is for the same purpose that a common variety of limestone would be used for, so long as it showed that the deposit had a unique property giving it distinct and special value for such use. To do so, it must show, at a minimum, that the mineral deposit in question has a unique property; and that the unique property gives the deposit a distinct and special value. These requirements are articulated in McClarty v. Secretary of the Interior, 408 F.2d at 909, and adopted in 43 CFR 3830.12(b)(2) and (3), and derive straight from the Common Varieties Act's specification that uncommon varieties must have "distinct and special value." 30 U.S.C. § 611 (2000).

Pitkin's presentation simply does not support such a finding. Romig, the single and only purchaser either to be found or to testify did not describe anything "unique" or of "distinct and special" value in the stockpiled limestone. Even starting with the assumption, as he did, that the calcium carbonate quality was 89-92%, he never identified that quality of the material as a unique property. Rather, he made clear that there were other suppliers. The Climax Mine price chart (Lewicki Report Attachment 10) makes clear that the mine could have been supplied by any limestone higher than 85% calcium carbonate, and that Climax would not have paid a premium even for the highest quality of limestone. Romig's strongest endorsement of the quality of the material was that he "liked" it because it was economical. He stressed that Calco's screening process was not as good as Pitkin's. What gave Pitkin's sales special value to Romig was that Pitkin's "good price" undersold Calco's, and that Pitkin provided better service. Doing both was undoubtedly in Pitkin's interest, particularly in light of this Board's directive to prove a qualifying end-use. But these factors do not constitute a unique property or show a distinct and special value for the material, and Romig himself made clear that the stone had no real unique property by commenting that, before Pitkin approached him to sell its material to him, he had been purchasing from other suppliers for years, and should Pitkin depart the market, he would do so again.

The unique property must be in the rock itself, not in services extended to the purchaser by the mining claimant. "Our decisions caution that such a finding must be predicated on a unique property inherent in the deposit itself, and not on extrinsic factors." United States v. Thompson, 168 IBLA 64, 110 (2006), citing, e.g., United States v. Henri (On Judicial Remand), 104 IBLA 93, 98-99 (1988); United States v. Smith, 66 IBLA 182, 188 (1982); United States v. Heden, 19 IBLA 326 (1975), aff'd, No. 75-543 (D. Ore. Aug. 4, 1977); aff'd, No. 77-3334 (9th Cir. Mar. 19, 1980). That Pitkin undercut the price charged by Calco, provided better service, or had screened its fines better is not a value intrinsic to the rock. In United States v. Stevens, 14 IBLA 380, 391, 81 I.D. 83, 87 (1974), we noted that the "fact that the stones may be polished is not sufficient to meet the uncommon variety test \* \* \*. It is the value of the stone deposit as it is found on the claims that is the important factor, not any enhanced value which might be obtained for a fabricated or marketed product of the deposit. McClarty v. Secretary of the Interior, 408 F.2d [at 909]."

We see Pitkin's rebuttal as follows: This Board issued its decision in Mid-Continent, Inc., in 1999. We observed: "Appellants do not aver that the fines can be sold for a qualifying end use [and] the record suggests the opposite \* \* \*. Appellants may dispose of mineral material from any or all of the stockpiles, provided they can show to BLM's satisfaction that they can market it for qualifying end-uses." 148 IBLA at 378. At the time of the appeal, the record showed no market for the stockpiles, except possibly as common variety material for use in road beds. Id. at 373.

Pitkin testifies now that when it mined from the quarry, the miners sorted material by size, stockpiling material for which there was no market. “They produced the other two sizes, which they sold to the power plant and then the other size went for rock dust and the rock dust plant. So at the time, they didn’t have a market for the fines.” (Tr. 450.) Thus, the testimony now shows that the fines had no market and could not have been sold as either locatable or common variety material.

Pitkin located the stockpiles under new mining claims and initiated a market search for potential purchasers of the material. The Lewicki Report acknowledged that the quality of the material needed for what is, as a statutory and regulatory matter, defined as uncommon variety limestone, was higher than that available in the stockpiles. (P. Ex. 33 at 4 (rock dust 98% carbonate), and at 5 (95% power plant scrubber material).) Lewicki attempted to market the fines for any use that would pay more than sales as road base material. Companies were complimentary, but their positive comments relate mostly to the quarry; those about the stockpiled material amount, at most, to social pleasantries. Only the Climax Mine actually bought the stockpiled material as a soil amendment, switching its purchases from Calco and the Fort Collins quarry when Pitkin offered a sales price of \$30/ton, undercutting Calco’s price (\$35/ton) by \$5/ton. Pitkin could do so because the material was stockpiled and Pitkin could set a price that did not require recovery of mining costs already attributed to locatable and common variety materials sold from the quarry in years past. By failing to account for mining costs (which would be, according to the 2003 Mining Feasibility Study, \$6.97 to \$7.97 per ton (P. Ex. 45 at 2)), Pitkin could undercut other suppliers and still record a higher profit.<sup>24/</sup> Pitkin incurred costs to quarry, screen, and segregate the stockpiled limestone, which it did not then sell. Had Pitkin sold that material as a soil amendment instead of stockpiling it, the costs would have been considered in determining the profits of the sale. The value to Pitkin based on its decision to allocate no cost to mining the materials is extrinsic to the deposit and ultimately can be manipulated by Pitkin.

Even then, the Climax Mine provides a small market and, since 2000, purchased only 4,186 tons. (P. Ex. 46.) Notably, the highest purchase year was 2001 (1,863 tons); Climax’s purchases in 2002 and 2003 amounted to 239 tons and 1,018 tons, respectively. Climax would not commit to a future contract; when asked whether Climax intended “to continue to use the Pitkin Iron limestone,” Romig responded: “At this point, yes.” (Tr. 490 (emphasis added).) Even though Phelps Dodge’s Henderson Mine had only one purchase of Pitkin material, it was “too early to tell” whether it might buy any more. (Tr. 502.) Romig stated that he would buy

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<sup>24/</sup> Assuming Romig’s testimony that Calco sold material of unstated quality for \$35/ton, and that costs of transportation and mining were similar (\$17 for haulage and for mining costs, \$6.97 to \$7.97), Calco’s maximum profits for such as sale would be \$11.03-\$12.03/ton.

other limestone at a better price. These facts fail to support a case that the limestone had a “unique” property or a “special and distinct value” to the only purchaser.<sup>25/</sup>

[6] Pitkin argues that a unique property is found in the high quality of carbonate material. Though extended the opportunity, Romig refused to say that this was the case; rather, he seemed only vaguely aware of the grade. Lewicki’s feasibility study listed the “current sales” as based on 91% calcium carbonate. (P. Ex. 45 at 2.) As noted above, Pitkin did not offer evidence to show that the grade of the stockpiled material is a unique property. By contrast, the Government submitted evidence that much, if not all, of the State of Colorado is underlain by limestone; 51 quarries are in operation. BLM witnesses testified and BLM argued that material in the range of 88.2% carbonate is ubiquitous and, even accepting Pitkin’s higher values, that 89-91% calcium carbonate is extremely common. Pitkin submitted nothing to refute this. As noted above, given that the material has a total carbonate content less than 95%, Pitkin was required to meet the tests of McClarty, 408 F.2d at 909. In the absence of any testimony by Romig that the Pitkin material has distinct and special value to the Climax Mine other than a “good price,” it is incumbent upon Pitkin, in propounding the view that the quality of the deposit is unique, to submit something to support the view that contrasted with “other deposits of such minerals generally,” 43 CFR 3810.12(b)(1), the material in the stockpiles is significantly different.

The best Pitkin has shown on this point is that the in situ quarry materials were of chemical grade quality in 1964-74. (P. Ex. 6 (EA); P. Ex. 25, at 21 (Vanderwilt letter).) The quarries were mined; chemical grade material was sold; what did not sell was stockpiled. This is not probative of a unique property of the stockpiled material.

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<sup>25/</sup> The sale to Henderson reportedly occurred on Sept. 16, 2003, a month before the hearing, and Delaney testified that she dropped the price from \$35 to \$32/ton out of “good business” practice. Such facts, combined with Romig’s refusal to commit to future purchases, raise questions as to whether the sale was made for purposes of the hearing and preparation of a sales report (P. Ex. 46) days before the hearing. Likewise, the Phoenix contract (P. Ex. 42) has no date, though it is dated without explanation on the list of sales (P. Ex. 46) on Oct. 23, 2003, 5 days before the hearing. The exhibit is not in form a contract containing an offer and acceptance; it asks instead for a “reply with shipping cost estimate,” meaning no price was actually established. Further, it contains no specification other than 15 tons of limestone crusher fines, and 15 tons “rip-rap.” Rip-rap is not found at the stockpiles in question. Even Judge Holmes was dubious about this “contract” and Delaney could not testify free of inconsistencies regarding its terms. In the best case for Pitkin, we find that this document (P. Ex. 42) reflects another expression of good intentions. Even if it actually crystallized into a contract that later was performed, there is no evidence of a market existing independent of the period surrounding the hearing.

Pitkin's effort to equate the stockpiled materials with the in situ material in the Mid-Continent Quarry is also not supportable. As noted above, the quarry itself had a carbonate content of 96-99%, the sampling program conducted for the stockpiles on behalf of Pitkin for purposes of this case showed average values closer to 89% or 91%, depending on whether we look to the information supplied by Hazen or Arrakis. (Tr. 436 (testimony of Lewicki); P. Exs. 44 (Hazen results), and 47 (Arrakis results).) In addition, as noted above, there are questions regarding the quality of the material sent to Climax (P. Ex. 24) raised by the lower quality sample 5; otherwise its quality is 91-92%. Lewicki attempted to inflate that figure by adding a conjectural 1.5% magnesium carbonate (Tr. 400-409), but later testified that this constituent was not even relevant to the Climax Mine (Tr. 450). See also P. Ex. 45 at 2 (91%).<sup>26/</sup>

All of the evidence regarding the value of the limestone outcrop at the Marblehead and Mid-Continent Quarry sites provides historical information at most, as opposed to factual evidence, of the value of the material in the stockpiles. We reject Pitkin's reliance on the December 8, 1964, report entitled "Limestone Deposit of Basic Chemical Corporation, Glenwood Springs, Colorado," prepared by then mining claimant, Basic Chemical Corporation, as evidence of material in the stockpiles. (P. Ex. 25, at 21.) As noted above, that statement related to the Leadville limestone outcrop in place 40 years ago. It has no evidentiary bearing on the quality of the stockpiles, which is accurately defined by the sampling conducted by the parties. In fact, this evidence reflects the conceptual problems behind Pitkin's case. As it has shown in this appeal, the Leadville limestone outcropping contained substantially valuable, locatable grade limestone (by chemical definition). MCR and Pitkin mined and sold material, some of it locatable and some admittedly common variety. They closed the quarry for lack of a market. Yet, Pitkin asks this Board to presume that the material they could not sell, but stockpiled, when selling material from the quarry is as unique as the high quality locatable limestone MCR did sell and higher in quality than the common variety limestone sold. We will not engage in such speculation, but instead require evidentiary support.

Delaney's testimony in support of the allegedly high value of the stockpiles derived from the 1994 grab samples. (P. Ex. 19.) Notwithstanding this Board's

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<sup>26/</sup> Pitkin objects to the Government's discussion of carbonate content without accounting for magnesium carbonate because it is "total carbonate" that is critical to determining whether limestone is chemical grade. (Answer at 22.) Not one fact in the record suggests that the material in the stockpiles is of chemical grade (at least 95% carbonate); Lewicki and Romig conceded it was not and Pitkin concedes in its brief that its material is "short of the 95% level." Id. Adding magnesium for any other purpose is not relevant because Pitkin could find no one to purchase its stockpiled material who cared about the magnesium content.

repudiation of such samples as reliable evidence of the value of the stockpiles, 148 IBLA at 377, Delaney insisted that the 1994 grab sample “test results were indicative of higher-quality limestone.” (Tr. 382, P. Ex. 19.) Despite Pitkin’s own sampling showing, at best, 92% carbonate content in the stockpiles, Delaney insisted that the 1994 grab samples confirmed carbonate content at “between 91 and 95 percent.” (Tr. 382.) Delaney’s testimony is of little probative value on this point given that the Board was unwilling to consider those samples and directed the parties to conduct representative sampling. Where they did so and came up with significantly lower numbers, we will not accept Delaney’s inflation of the results derived by her client. <sup>27/</sup>

Pitkin’s own assays achieved only a quality ranging from 87% to 92% calcium carbonate, and thus could not constitute “chemical grade.” To the extent Pitkin was relying on the carbonate quality of the limestone for a unique property, it was incumbent upon Pitkin to submit evidence to show that such values are unique comparing the mineral deposit in question with other deposits of such materials generally. It chose to ignore that comparison and instead to criticize BLM for making it. <sup>28/</sup>

Pitkin has raised a number of technical arguments that we have considered and rejected. We respond only, and finally, to Pitkin’s objection to the Government’s sampling because of Pitkin’s claim that the Grand Junction Lab’s 2001 analytical report was tainted by the assayer’s failure to properly dry the samples. We do not need to rely on those samples for our conclusion. We note, though, that such arguments undercut Pitkin’s presentation. Had Pitkin any evidence to support its

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<sup>27/</sup> Pitkin persists in supporting the use of the grab samples by citing to the word “quantitative” in the Board’s decision, 148 IBLA at 377; it asserts that the Board meant to discount grab sample statistics only for quantitative use. In the Board’s footnote 6, we cited the Mineral Examiner’s Handbook explaining that while “grab sampling may yield valuable information, it is not systematic or statistically valid” and causes “unintentional high grading.” We said: “Grade and tonnage figures are not reliable if calculated from grab samples.” 148 IBLA at 377 n.6. The Board has explained that grab samples are not representative because of the lack of evidence regarding the origin or derivation of such material. E.g., United States v. Mavros, 122 IBLA 297, 306 (1992).

<sup>28/</sup> Pitkin argues, and Judge Holmes apparently accepted, that the Government was obligated to show something more than the ubiquitous nature of limestone in Colorado, as it did with its Exhibits 2 and 3. The prevalent nature of limestone is the factor in Congress’ removing it, except in special circumstances, from the application of the mining laws. Pfizer, 76 I.D. at 338. The Government met its burden with its exhibits. Pitkin’s case is premised on the uniqueness of its limestone; it is Pitkin’s burden to prove it with rebuttal evidence.

aspersions regarding the Lab's alleged failures to conduct this most basic of sampling functions, it could have obtained testimony of a witness involved in the Lab's assays. Pitkin presented nothing in support of its speculation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Holmes's decision is reversed and the Chemin Nos. 5 and 6 mining claims are declared null and void for failure of the claimants to identify a locatable deposit of uncommon variety limestone.

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Lisa Hemmer  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge